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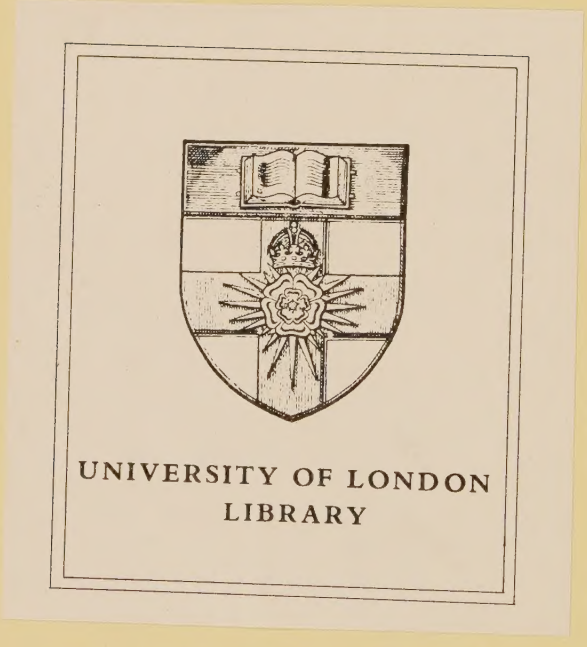

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THE
LAW REPORTS
1987

House of Lords

and

Judicial Committee of the Privy Council

and

Peerage Cases

London

THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

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THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES
1987

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1987

MEMORANDA

1986

19 June THE RIGHT HON. LORD BRIGHTMAN, a Lord of Appeal in Ordinary since 1982, retired.

1987

12 Jan. THE HON. SIR THOMAS PATRICK RUSSELL, a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since 1980, was appointed a Lord Justice of Appeal and was sworn a member of the Privy Council.

12 Jan. NICHOLAS ADDISON PHILLIPS, Q.C., was appointed to be one of the Justices of her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.

13 June THE RIGHT HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., Lord Chancellor from 1970 to 1974 and since 1979, resigned.

13 June THE RIGHT HON. SIR MICHAEL HAVERS, Q.C., was appointed Lord Chancellor and was introduced in the House of Lords on 22 June with the title of THE RIGHT HON. LORD HAVERS OF ST. EDMUNDSBURY.

17 June THE RIGHT HON. SIR MICHAEL HAVERS, Q.C., Attorney-General since 1979, resigned.

17 June THE RIGHT HON. SIR PATRICK BARNABAS BURKE MAYHEW, Q.C., was appointed Attorney-General.

19 June THE RIGHT HON. SIR PATRICK BARNABAS BURKE MAYHEW, Q.C., Solicitor-General since 1983, resigned.

19 June NICHOLAS WALTER LYELL, Q.C., was appointed Solicitor-General.

8 Sept. THE RIGHT HON. SIR DAVID ARNOLD SCOTT CAIRNS, a Justice of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, from 1960 to 1970, and a Lord Justice of Appeal from 1970 to 1977, died, aged 85.

2 Oct. HIS HONOUR JUDGE BLACKETT-ORD, Vice-Chancellor of the County Palatine of Lancaster since 1973, retired.

3 Oct. THE RIGHT HON. SIR RICHARD RASHLEIGH FOLLIOTT SCOTT, a Justice of Her Majesty's High Court of Justice, Chancery Division, since 1983, was appointed Vice-Chancellor of the County Palatine of Lancaster.

27 Oct. THE RIGHT HON. LORD HAVERS, Lord Chancellor since June 1987, resigned.

27 Oct. THE RIGHT HON. LORD MACKAY OF CLASHFERN, a Lord of Appeal in Ordinary since 1985, was appointed Lord Chancellor.

26 Dec. THE RIGHT HON. SIR MELFORD STEVENSON, a Justice of Her Majesty's High Court of Justice, Probate, Divorce and Adminralty Division from 1957 to 1961, and of the Queen's Bench Division from 1961 to 1979, died, aged 85.

The mode of citation of the Volumes of the *Law Reports* commencing 1 January 1987 will be as follows:

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(English, Irish and Scottish)

and

THE JUDICIAL COMMITTEE

C

of Her Majesty's Most Honourable

PRIVY COUNCIL

D

[HOUSE OF LORDS]

E

REGINA . . . . . RESPONDENT

AND

SHIVPURI . . . . . APPELLANT

1986 Feb. 4, 24; May 15

F

Lord Hailsham of St. Marylebone L.C., Lord Elwyn-Jones, Lord Scarman, Lord Bridge of Harwich and Lord Mackay of Clashfern

Crime—Attempt—Drugs importation, prohibition on—Belief in substance dealt with and harboured being heroin—Substance in fact not drug—Whether attempting to be knowingly concerned in dealing with or harbouring drug—Customs and Excise Management Act 1979 (c. 2), s. 170(1)(b)—Criminal Attempts Act 1981 (c. 47), s. 1

G

Judicial Precedent—House of Lords decisions—Power to overrule previous decisions—Whether permissible notwithstanding especial need for certainty in criminal law

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The appellant was tried on counts of attempting to be knowingly concerned in dealing with and harbouring a controlled drug, namely, heroin, the importation of which was prohibited, contrary to section 1(1) of the Criminal Attempts Act 1981[1] and section 170(1)(*b*) of the Customs and Excise Management Act

[1] Criminal Attempts Act 1981, s. 1: see post, p. 19A–D.

1979.[2] He was carrying a package containing a powdered substance and more such substance was found in his flat. Evidence for the prosecution was that at several police interviews he admitted having drugs and under caution he typed his own confession statement and stated that he thought the package contained drugs. In a later interview he stated that he very deeply suspected that the substance was heroin. Analysis proved it to be merely vegetable material akin to snuff. In evidence he denied making any admissions about drugs and denied that the typed statement amounted to a confession because from testing the substance he knew that it was not drugs. He was found guilty on both counts. He appealed against conviction on the ground that, because the substances found in his possession were not drugs, he could not be guilty of attempting to be concerned in either dealing with or harbouring a controlled drug as charged. The Court of Appeal (Criminal Division) dismissed the appeal.

On appeal:—

Held, dismissing the appeal, (1) that where a person was charged under section 170(1) of the Customs and Excise Management Act 1979 with being knowingly concerned in harbouring or dealing with goods the importation of which was prohibited, it was sufficient to prove that the person knew that the goods concerned were prohibited goods and that, irrespective of the different penalties attaching to offences in connection with the importation of different categories of prohibited goods, no proof was required that he knew the goods to be of a particular category; accordingly, it was immaterial that the appellant was unsure of the exact nature of the substance in his possession in that in any event he believed that he was dealing with either heroin or cannabis the importation of which was prohibited (post, pp. 11A, 13C–D, 17C–G, 23G—24A).

Reg. v. Hussain [1969] 2 Q.B. 567, C.A. approved.

(2) That on the true construction of section 1 of the Criminal Attempts Act 1981 the actus reus of the statutory offence of attempt required an act which was more than merely preparatory to the commission of an offence and which the defendant did with the intention of committing an offence, notwithstanding that the commission of the actual offence was, on the true facts, impossible; and that applying the language of the section to the facts of the case the appellant had been rightly convicted of the offences as charged (post, pp. 11A, 13C–D, 19G—20A, 23G—24A).

(3) That the distinction which the House had previously sought to draw in regard to section 1 between acts which were "objectively innocent" and those which were not, could not be maintained and that case had therefore been wrongly decided and, on the basis that it was indistinguishable from the present appeal, would be departed from under the *Practice Statement* (post, pp. 21G, 23A–C).

Anderton v. Ryan [1985] A.C. 560, H.L.(E.) overruled.

Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234, H.L.(E.) applied.

[2] Customs and Excise Management Act 1979, s. 170: "(1) . . . if any person—(a) knowingly acquires . . . (iii) goods with respect to the importation . . . of which any prohibition . . . is . . . in force . . . or (b) is in any way knowingly concerned in . . . harbouring . . . or . . . dealing with any such goods, and does so with intent . . . to evade any such prohibition . . . he shall be guilty of an offence . . ."

Per Lord Hailsham of St. Marylebone L.C. and Lord Mackay of Clashfern. Even if the *Practice Statement* had not been applied to *Anderton v. Ryan* the appeal would still have been dismissed by distinguishing its facts from that case, on the basis that the appellant was guilty on the clear wording of section 1(1) and (2) of the Act of 1981 and that no recourse was therefore necessary to the wording of section 1(3) which if so would be irrelevant (post, pp. 12A, 23G—24A).

Decision of the Court of Appeal (Criminal Division) [1985] Q.B. 1029; [1985] 2 W.L.R. 29; [1985] 1 All E.R. 143 affirmed.

The following cases are referred to in their Lordships opinions:

Anderton v. Ryan [1985] A.C. 560; [1985] 2 W.L.R. 968; [1985] 2 All E.R. 355, H.L.(E.)

Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.)

Reg. v. Courtie [1984] A.C. 463; [1984] 2 W.L.R. 330; [1984] 1 All E.R. 740, H.L.(E.)

Reg. v. Hennessey (Timothy) (1978) 68 Cr.App.R. 419, C.A.

Reg. v. Hussain [1969] 2 Q.B. 567; [1969] 3 W.L.R. 134; [1969] 2 All E.R. 1117, C.A.

Reg. v. Hyam [1975] A.C. 55; [1974] 2 W.L.R. 607; [1974] 2 All E.R. 41, H.L.(E.)

Reg. v. Smith (Roger) [1975] A.C. 476; [1974] 2 W.L.R. 1; [1973] 3 All E.R. 1109, H.L.(E.)

The following additional cases were cited in argument:

Cookson v. Knowles [1979] A.C. 556; [1978] 2 W.L.R. 978; [1978] 2 All E.R. 604; [1978] 2 Lloyd's Rep. 315, H.L.(E.)

Fitzleet Estates Ltd. v. Cherry [1977] 1 W.L.R. 1345; [1977] 3 All E.R. 996, H.L.(E.)

People v. Jaffe (1906) 185 N.Y. 497

President of India v. La Pintada Compania Navigacion S.A. [1985] A.C. 104; [1984] 3 W.L.R. 10; [1984] 2 All E.R. 773; [1984] 2 Lloyd's Rep. 9, H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74; [1983] 2 W.L.R. 321; [1983] 1 All E.R. 765, H.L.(E.)

Reg. v. Taaffe [1984] A.C. 539; [1984] 2 W.L.R. 326; [1984] 1 All E.R. 747, H.L.(E.)

Rex v. Percy Dalton (London) Ltd. (1949) 33 Cr.App.R. 102, C.C.A.

Westminster City Council v. Croyalgrange Ltd. [1985] 1 All E.R. 740, D.C.

APPEAL from the Court of Appeal (Criminal Division).

This was an appeal by the appellant, Pyare Shivpuri, by leave of the Court of Appeal (Criminal Division) (Ackner L.J., Stuart-Smith and Leggatt JJ.) [1985] Q.B. 1029 from their judgment dismissing his appeal against conviction at the Crown Court at Reading on 13 February 1984 before Judge Pigot Q.C. and a jury on one count of attempting to be knowingly concerned in dealing with a controlled drug the importation of which was prohibited under section 3(1) of the Misuse of Drugs Act 1971, contrary to section 1(1) of the Criminal Attempts Act 1981 and section 170 of the Customs and Excise Management Act 1979 and a second count of attempting to harbour a similar controlled drug. The

Court of Appeal certified that the following point of law of general public importance was involved in their decision, namely,

> "Does a person commit an offence under section 1 of the Criminal Attempts Act 1981 where, if the facts were as that person believed them to be, the full offence would have been committed by him, but where on the true facts the offence which that person set out to commit was in law impossible, e.g., because the substance imported and believed to be heroin was not heroin but a harmless substance?"

The facts are set out in the opinion of Lord Bridge of Harwich.

David Christie for the appellant. The point of law certified concerns the proper construction of section 1 of the Criminal Attempts Act 1981. In particular it concerns whether the effect of section 1(ii) and (iii), which deal with a person having the necessary *intent* for an attempt, notwithstanding that the facts are such that the commission of the actual offence is impossible, applies only to the state of mind of an accused (mens rea) or to his conduct (actus reus) as well, in a case where an accused does all that he set out to do, with guilty intent, but his actual acts were innocent. Two further points arise. First, the fact that the statute which it was alleged the offence was under contains the word "knowingly." Here belief has been treated as synonymous with knowledge, contrary to *Reg. v. Taaffe* [1984] A.C. 539. Secondly, *Reg. v. Courtie* [1984] A.C. 463 cannot stand with the principle in *Reg. v. Hussain* [1969] 2 Q.B. 567, that only knowledge of smuggling a prohibited drug was necessary—the jury do not decide which class of drug it was. Under *Courtie* an accused person cannot be convicted unless the prosecution has established that each of the factual ingredients in the definition of the offence has been proven.

Dealing with the certified point, at no time did the appellant do an act more than merely preparatory to the commission of an offence under section 170 of the Customs and Excise Management Act 1979. He was concerned with harbouring and subsequently dealing with innocent substances, the importation of which is not prohibited or restricted by any enactment. His guilty intent cannot convert or transmogrify his conduct such that it becomes an act more than merely preparatory to the commission of an indictable offence if it were completed.

The legislature has missed fire if the Act of 1981 was intended to cover the instant facts. The Act applies only to any offence which, if it were completed, would be triable in England and Wales as an indictable offence: section 1(4).

Section 1(1) of the Act of 1981 should be construed as follows: "A person is guilty of attempting to commit an offence which if it were completed, would be triable in England and Wales as an indictable offence, if he does an act which is more than merely preparatory to the commission of such an offence *and* does such an act with the intent to commit such offence." Section 1(2) of the Act of 1981 only applies to an indictable offence: there is no such offence of harbouring or dealing with snuff.

The instant case is not distinguishable from *Anderton v. Ryan* [1985] A.C. 560. The principle of law established in *Anderton v. Ryan* is that if

the action is innocent and the defendant does everything he intends to do, his erroneous belief in the existence of facts which if true would have made his completed act a crime, does not make him guilty of an attempt to commit that crime: see the speech of Lord Roskill at [1985] A.C. 560, 580, and Lord Bridge of Harwich at p. 584.

In their case the Crown seek to distinguish *Anderton v. Ryan* by arguing that section 1(2) of the Act of 1981 covers the facts of this case but does not cover the case of a defendant who sets out to commit an act which in fact is innocent if completed in accordance with his objective even though he believes it would be an offence. This distinction was referred to in the Law Commission Report (Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement) (1980) (Law Commission No. 102) at paragraph 2.98 pp. 52–53. The Law Commissioners' recommendations to bring "factual impossibility" within the scope of the statutory definition of the crime of "attempt," appear at paragraph 2.100 (pp. 53–54). In their recommendations they considered that the mere fact a person believed a certain course of conduct was an offence, and then carried it out, does not make him guilty of an attempt if, and only if, his belief was erroneous as to the law, because in fact the course of conduct was lawful.

It is now settled law by *Anderton v. Ryan* [1985] A.C. 560 that the Act of 1981 has not introduced the same principle contained in paragraph 2.100 of the Law Commission report into the law of attempt. In *Anderton v. Ryan* the defendant's error was that she believed the goods to be stolen when they were not. She was under no misapprehension as to the law. She is saved by the *fact* that the goods were not stolen. Similarly in *Reg. v. Smith (Roger)* [1975] A.C. 476 he is saved, even under the Act of 1981, by the fact that the goods had been taken into police custody and had, therefore, lost their character as stolen goods. In the present case the appellant is saved by the *fact* that the goods he harboured and dealt in were not controlled drugs, subject to a prohibition against importation, despite the fact that he, too, was under no misapprehension as to the law. The argument that if the suitcase had been empty the position would have been indistinguishable on the instant facts from the case of a pickpocket who places his hand in an empty pocket does not stand examination.

Can it be said, that if the police had emptied the van in *Reg. v. Smith (Roger)* [1975] A.C. 476 he, too, would be guilty of attempt, applying section 1(2) of the Act of 1981, when he went to the back of the van and opened the door, intending to handle goods which he believed to be stolen, and, which he believed to be in the back of the van, though in truth they were not stolen and were not in the back of the van? Such an analysis runs entirely contrary to the whole basis upon which the prosecution case in both *Reg. v. Smith (Roger)* and in the present case was put. In *Reg. v. Smith (Roger)* the conduct of the alleged attempt was the actual handling of non-stolen goods. In the instant case the conduct of the alleged attempt is the actual harbouring and dealing in packages containing vegetable material.

With regard to the traces of heroin found in the suitcase, the trial judge directed the jury that the fact the appellant had no explanation for

such was not incriminating. He further directed that the jury should not speculate as to the reasons for their presence in any way adverse to the appellant. A

The Crown's case should be examined on the correctness or otherwise of the argument that on the instant facts the state of mind (mens rea) to constitute the crimes charged was the appellant's intent to deal in and harbour controlled drugs, which were subject to a prohibition against importation, and the conduct (actus reus) to constitute such offences was dealing in and harbouring goods which the appellant believed to be heroin, although in truth they were not heroin nor any other prohibited substance. B

The appellant's case is that if one cannot be guilty of attempting to handle stolen goods when the goods are not stolen, then one cannot be guilty of attempting to be knowingly concerned in dealing in or harbouring controlled drugs, the importation of which is prohibited, when the substance dealt in or harboured was not a controlled drug, subject to any prohibition against importation. C

The proper ambit of the "principle of legality" within the law of attempt after the Act of 1981 is wider than that referred to in the Law Commission report. It not only covers the person who smuggles sugar, knowing it to be sugar but believing sugar to be dutiable (an erroneous belief as to the law), but also the person who smuggles sugar, believing it to be heroin and knowing that smuggling heroin is prohibited (where the erroneous belief is in the facts). Parliament has not in express language changed the law so that the conduct ("actus reus") of an attempted heroin smuggler can be found in the act of smuggling sugar. The proper ambit of the "principle of legality" is that there was no act more than merely preparatory on the instant facts to being actually concerned in harbouring or dealing in a controlled drug, the importation of which is prohibited, because the appellant was only concerned in dealing in and harbouring packages of snuff or vegetable material. D E

It matters not whether the appellant's mistake was one of fact or law insofar as his knowledge or belief is concerned. It is the effect of that mistake which is material, in that no man can attempt a non-existent crime. There is no offence of handling non-stolen goods, and there is no offence of being concerned in the importation of goods which are not prohibited. F

To bring the instant facts within the ambit of the criminal law Parliament would need to create an offence as follows, that it is an offence to: (1) Be concerned in dealing in or harbouring goods, (2) *believing* the importation of such goods to be prohibited, where, (3) the goods in which the person believed he was concerned in dealing or harbouring were in fact subject to a prohibition against importation, it being no defence that in fact the actual goods dealt in or harboured were not subject to a prohibition, and, therefore, the person's belief as to their importation being prohibited was erroneous. The wording of section 1(2) and 1(3) of the Act of 1981 cannot, on any construction, have so far-reaching an effect. Section 1(2) only covers offences to which the section applies, namely any offence which if it were completed would be triable as an indictable offence (see section 1(4)). G H

A The effect of the Act of 1981 is to clarify the law and solve the difficulties that arose out of the observations (which were obiter) in *Reg. v. Smith (Roger)* [1975] A.C. 476 with regard to the pickpocket type of case. The principle expressed in *Rex v. Percy Dalton (London) Ltd.* (1949) 33 Cr.App.R. 102, 110, that "steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime" has not been overruled by the B Act of 1981.

In *Anderton v. Ryan* [1985] A.C. 560, 584 Lord Bridge of Harwich referred in his speech to the fact that in *Reg. v. Smith (Roger)* the defendant's act was "innocent" in relation to the charge of attempt, although he was guilty of conspiracy. It is not, therefore, open to the Crown in this case to contend that the agreement made by the appellant C in India renders his conduct (for the purposes of an attempt) as being other than "innocent."

In relation to physical impossibility, if a man forms an intention to murder a specific person and unbeknown to him shortly before he formed such intention, that person dies, if he then goes on to stick a knife in that corpse, he is not guilty of attempted murder. Similar principles apply with regard to alleged attempts to steal your own D property. These acts are not substantive indictable offences and therefore it is not possible to be convicted of their attempt.

Alan Suckling Q.C. and *Tony Docking* for the Crown. The present case is distinguishable from *Anderton v. Ryan* [1985] A.C. 560. The appellant's conduct falls within section 1(1) and (2) of the Act of 1981. Section 1(1) requires that there is an attempt to commit an offence to E which the section applies. Section 1(2) covers the case of a defendant who sets out to commit an act which would be an offence if completed in accordance with his objective, but does not cover the case of a defendant who sets out to commit an act which would not be an offence if completed in accordance with his objective even though he believes it would be an offence.

The appellant's objective was to harbour and deal in a controlled F drug, heroin, not to harbour and deal in packages of snuff. Had he achieved this ambition he would have committed an offence. In fact he could never have achieved his objective because the suitcase did not contain controlled drugs apart from the traces of heroin. The facts were such that the commission of the offence was impossible. If the suitcase had been empty the position would have been indistinguishable from the G case of a pickpocket who placed his hand into an empty pocket. It cannot make any difference that the suitcase contained packages that looked like heroin. In *Anderton v. Ryan* [1985] A.C. 560 the defendant's objective was to buy a particular video recorder, not to buy a stolen one. Her objective once completed was not an offence even though she believed it to be so.

Anderton v. Ryan was wrongly decided if the decision was based on H the distinction between acts which were innocent and those which were guilty considered objectively and leaving aside the state of mind of an accused. Such a distinction did not exist at common law; the actions of a man who walked down a public highway with matches in his hand were

innocent considered objectively but he could have been guilty of a criminal attempt if he intended to set fire to a nearby haystack. There is no requirement in the Act of 1981 that the actions of an accused must be objectively guilty. The distinction would produce strange results. If a man plunges a knife into a pillow in a bed believing it to be his wife whom he intends to kill, his act is objectively innocent unless the pillow belongs to someone else when it would amount to criminal damage. Parliament cannot have intended his guilt of attempted murder to depend on the ownership of a pillow.

The construction of section 1 of the Act of 1981 rejected by the House in that case was the one intended by Parliament. One must read subsection (3) back into subsection (I); the act must be more than merely preparatory to the commission of the offence intended by the accused taking the facts of the case as he believed them to be.

If a man intends to commit an offence and does everything possible to commit it but some extraneous circumstances prevent him from so doing, it is not unfair for him to be convicted of the crime of attempt.

Christie in reply. On the general principle of the public good, attempted offences where there is no actus reus are not dangerous to the public. In cases where there would be public concern, there are offences other than attempt which could be charged. The compartmentalisation of actus reus and mens rea exists in all cases and should not be watered down. Section 1(2) of the Act of 1981 only applies if there is a step that is more than merely preparatory to the committing of an indictable offence, objectively speaking.

[Argument being adjourned to a later date, counsel were invited to address the House further on *Reg. v. Hussain* [1969] 2 Q.B. 567, and also on the applicability of the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234.]

Christie. There is no reported case where (*a*) an authority on the construction of a criminal statute since 1966 has been overruled, (*b*) such a recent authority as *Anderton v. Ryan* [1985] A.C. 560 (decided under a year ago) has been overruled and (*c*) an authority limiting the manner in which a criminal statute affects the individual subject has been overruled in favour of the State. The *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 refers to the especial need for certainty in the criminal law. It has been considered in approximately 36 cases since 1966. Criteria which appear to exist are: (i) the freedom ought to be used sparingly. (ii) A decision concerning questions of construction of statutes ought not to be overruled other than in rare and exceptional cases. (iii) In the interests of certainty a decision ought not to be overruled merely because the House considers it was wrongly decided; there must be some additional reasons to justify such a step. (iv) A decision ought not to be overruled if to do so would involve a change that ought to be part of a comprehensive reform of the law. Such changes are best done by legislation following on a wide survey of the whole field: see *President of India v. La Pintada Compania Navigacion S.A.* [1985] A.C. 104. (v) A decision ought not to be overruled if it would be impracticable for the House to foresee the consequences of departing from it. (vi) A decision ought not to be overruled if to do so

would upset the legitimate expectations of people who have entered into contracts or settlements or otherwise regulated their affairs in reliance on the validity of that decision. (vii) A decision ought to be overruled if in relation to some broad issue or principle it is not considered just or in keeping with contemporary social conditions or modern conceptions of public policy. (viii) A decision ought to be overruled if it causes such great uncertainty in practice that the parties' advisers are unable to give any clear indication as to what the courts will hold the law to be.

The especial need for certainty in the criminal law indicates that the House's freedom since 1966 should not be utilised to overrule *Anderton v. Ryan.* In the modern era crimes should only be found to exist where the express words of a statute indicate such. It is the role of Parliament to set forth clear and unambiguous legislation in the criminal sphere. The House should not be driven to take upon itself this burden by virtue of the *Practice Statement.*

Judicially indicated guidelines are not rules of law but are to be followed unless the particular circumstances of a case indicate that they would be inappropriate: *Cookson v. Knowles* [1979] A.C. 556, 579, *per* Lord Scarman.

The weight to be attached to each criterion in hard cases is peculiarly within the province of the House. In this field of jurisprudential and constitutional complexity, where such far-reaching consequences exist, the role of the Bar, by advocacy in a particular case, is uncertain.

The closest comparable case *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74 (which overruled part of a case decided four years earlier) should be distinguished, inter alia because the case did not concern the construction of a criminal statute leading to criminal penalties.

If *Anderton v. Ryan* were to be overruled there is a foreseeable danger that a differently constituted committee of the House might feel obliged in turn to overrule the present case and return to the general principles expressed in *Anderton v. Ryan:* see *Fitzleet Estates Ltd. v. Cherry* [1977] 1 W.L.R. 1345, 1349 *per* Lord Wilberforce. The care with which the *Practice Statement* has been interpreted in the last 20 years has been deliberately designed to avoid this danger. The principles expressed in *Anderton v. Ryan* derive from the actual language of the Act of 1981 and are themselves workable.

Dealing with the judge's direction to the jury that the appellant "need not know precisely what the prohibited goods were, as long as [he] knew that they were prohibited," that principle (based on *Reg. v. Hussain* [1969] 2 Q.B. 567) cannot be good law following *Reg. v. Courtie* [1984] A.C. 463, as Schedule 1 to the Customs and Excise Management Act 1979 creates different penalties depending on whether the drug is Class A and B or Class C. The fallacy of *Hussain* is demonstrated in the present case, where there is an attempt. There is no means of knowing which category of drug the jury believed he was concerned with. If *Hussain* is correct, the jury will not know if the defendant will face ten years' imprisonment or two years. When one is faced with an inchoate offence of this nature with no actual drug, the jury must find a specific mens rea as to the category of drug the

defendant believed it to be. Actual knowledge as opposed to erroneous belief is necessary: *Reg. v. Taaffe* [1984] A.C. 539; *People v. Jaffe* (1906) 185 N.Y. 497 and *Westminster City Council v. Croyalgrange Ltd.* [1985] 1 All E.R. 740, 743 *per* Robert Goff L.J.

Suckling Q.C. was invited to address the House on the *Hussain* point only. The principle in *Reg. v. Hussain* [1969] 2 Q.B. 567 remains good law. It is conceded that following *Reg. v. Courtie* [1984] A.C. 463 section 170 of the Customs and Excise Management Act 1979 must be taken to create separate offences in respect of prohibited drugs that are the subject of the first Schedule to the Act. Although the conduct to be proved to constitute an offence under section 170 where a Class A or B drug was involved would include proof that a drug of that particular class had been harboured or dealt with, "knowingly" should be construed to require proof of knowledge that prohibited goods were being harboured and not proof of knowledge that drugs of a particular class were involved. This construction should be adopted in view of: (*a*) the public importance of curtailing drug smugglers and (*b*) the difficulties of proving knowledge that a drug of a particular class was being smuggled. The penalties for harbouring controlled drugs have been more severe than other prohibited goods since the Dangerous Drugs Act 1967. If knowingly is construed to require proof of knowledge that a particular class of drug was being harboured both *Hussain* and *Reg. v. Hennessey (Timothy)* (1978) 68 Cr.App.R. 419 were wrongly decided and it would now be necessary for the Crown to prove knowledge that a drug of Class A was involved on a charge involving Class A drugs. Thus where a defendant was indicted for smuggling a Class A drug but the jury found that he believed that he was smuggling a Class B drug he would have to be acquitted and could not be convicted on that charge of attempted smuggling of the Class B drug. The state of mind of an accused does not necessarily vary with each type of case. The courier may only know that he is dealing in a drug without knowing what sort. While the indictment will specify the particular drug concerned, all that needs to be shown in relation to the required knowledge is that prohibited goods were being dealt with. In increasing the penalties for the more dangerous controlled drugs Parliament cannot have intended to make it more difficult to prove offences under section 170 where such drugs are involved. The Misuse of Drugs Act 1971 was intended to deal comprehensively with the growing menace of drug abuse; Parliament must be taken to have approved *Hussain* or section 304 of the Customs and Excise Act 1952 would have been included within the ambit of section 28 of the Misuse of Drugs Act 1971.

Christie in reply. The *Hussain* principle should, in the public interest, apply to substantive offences where the drug can be proved. But in inchoate offences of this type such proof is impossible. That is why section 28 of the Misuse of Drugs Act 1971 was not incorporated into the Customs and Excise Management Act 1979, as the Criminal Attempts Act 1981 was not then in being.

Their Lordships took time for consideration.

15 May. LORD HAILSHAM OF ST. MARYLEBONE L.C. My Lords, I have had the advantage of reading in draft the speech about to be delivered (and now available in print) by my noble and learned friend, Lord Bridge of Harwich. Save for one relatively minor point I agree with it in its entirety and would dispose of this appeal as he proposes and for the reasons which he gives. I add a few remarks of my own for reasons which will appear.

The first comment I make is that I believe that this is the first time that the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 has been applied to a decision as recent as that in *Anderton v. Ryan* [1985] A.C. 560. Ordinarily I might have been loth to take so bold a step, even though I may have entertained privately the thought that such a case so recently and so carefully considered and supported by two such powerfully reasoned judgments was nevertheless seriously open to question. Quite clearly a departure from recent decisions by means of the *Practice Statement* has dangers of its own which are too obvious to need elaboration. But there is obviously much to be said for the view about to be expressed by my noble and learned friend that "if a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better." This consideration must be of all the greater force when the error is, as in the present case, to be corrected by a palinode composed by one of the original authors of the majority judgment. I also agree with my noble and learned friend that in the very nature of the present case it would seem impossible that anyone could have acted to his detriment in reliance on the law as stated in the decision departed from. Thirdly, as one of the authors of the decision in *Reg. v. Smith (Roger)* [1975] A.C. 476 I must say that I had hoped that my opinion in that case would be read by Parliament as a cri de coeur, at least on my part, that Parliament should use its legislative power to rescue the law of criminal attempts from the subtleties and absurdities to which I felt that, on existing premises, it was doomed to reduce itself, and, after long discussions with the late Lord Reid, I had reached the conclusion that the key to the anomalies arose from the various kinds of circumstance to which the word "attempt" can be legitimately applied, and that the road to freedom lay in making an inchoate crime of this nature depend on a prohibited act (the so called, but ineptly called, "actus reus") amounting to something more than a purely preparatory act plus an intent (as distinct from an attempt) to carry the act through to completion. When the Criminal Attempts Act 1981 was carried into law, and I read section 6 which abolished altogether the common law offence except as regards acts done before the commencement of the Act, I was happily under the impression that my hopes had been realised, and that my carefully prepared speech in *Reg. v. Smith* would henceforth be relegated to the limbo reserved for the discussions of medieval schoolmen. It was therefore with something like dismay that I learned that the ghost of my speech had risen from what I had supposed to be its tomb and was still clanking its philosophical chains about the field, and that the new Act had formed a tilting yard for a joust of almost unexampled ferocity between two of the most distinguished professors of English criminal law in the United Kingdom.

I must add, however, that even had I not been able to follow my noble and learned friend in interring *Anderton v. Ryan* by using the *Practice Statement* of 1966, I would still have dismissed the instant appeal by distinguishing its facts from that case. Shortly, my reasoning would have been that the appellant was guilty on the clear wording of sections 1(1) and 1(2) of the Act of 1981 and that no recourse was therefore necessary to the wording of section 1(3) which if so would be irrelevant.

I would have arrived at this conclusion by asking myself three simple questions to which the answers could only be made in one form. They are: Q.1. What was the intention of the appellant throughout? A.1. His intention throughout was to evade and defeat the customs authorities of the U.K. He had no other intention. His motive was gain (the bribe of £1,000). But as I pointed out in *Reg. v. Hyam* [1975] A.C. 55, 73 motive is not the same thing as intention.

Q.2. Is the knowing evasion of the U.K. customs in the manner envisaged in the appellant's intent an offence to which section 1 of the Act of 1981 applies? A.2. Yes, see section 1(4).

Q.3. Did the appellant do an act which was more than preparatory to the commission of the offence? A.3. Yes, for the reasons stated in the relevant paragraphs of my noble and learned friend's speech.

In this connexion I do not feel it would have been necessary to invoke the doctine of dominant and subordinate intention referred to by my noble and learned friend. The *sole* intent of the instant appellant from start to finish was to defeat the customs prohibition. In *Anderton v. Ryan* [1985] A.C. 560 the only intention of Mrs. Ryan was to buy a particular video cassette recorder at a knock-down price, and the fact that she believed it to be stolen formed no part of that intention. It was a belief, assumed to be false and not an intention at all. It was a false belief as to a state of fact, and, if it became an intention it was only the result of the deeming provisions of section 1(3) of the Act of 1981. Whether or not *Anderton v. Ryan* was correctly decided, one has to go to section 1(3) to decide whether Mrs. Ryan had committed a criminal attempt under the Act as the result of her belief, assumed to be false, that the video cassette recorder had in fact been stolen. Similarly, to my mind, the only intention of the lustful youth postulated by my noble and learned friends, Lord Roskill and Lord Bridge of Harwich, by way of example in *Anderton v. Ryan* was to have carnal connexion with a particular girl. One has to go to section 1(3) to discover whether or not a criminal attempt had been committed as the result of his false belief that she was under age.

By way of conclusion I have to say that I think it a pity that, as it emerged from Parliament, the Act of 1981 departed from the draft Bill attached to the Law Commission report (Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) (Law Commission No. 102)), which might have saved a lot of trouble. In particular the distinction which I have sought to draw above between the facts in *Anderton v. Ryan* and the instant appeal would have been patently obvious and not to some extent controversial. In the second place it may perhaps have been inevitable, but is nonetheless unusual,

that, in defining the prohibited act in section 1, the draftsman in both cases was driven to define the act by reference to an intent, instead, as is more usual in criminal jurisprudence, of defining the criminal intent by reference to a separately defined prohibited act. It is this feature of section 1 which, I believe, has caused the trouble, and once this road has been followed it was I believe impossible to avoid the disadvantages pointed out in paragraph 2.97 of the Law Commission's report to which my noble and learned friend has drawn attention.

In the circumstances I am happy that my noble and learned friend's conclusion has enabled the House to arrive at its destination without resorting to these, possibly excessively sophisticated, subtleties.

LORD ELWYN-JONES. My Lords, having had the advantage of reading in draft the speech of my noble and learned friend, Lord Bridge of Harwich, with which I agree, I would dismiss the appeal as he proposes and for the reasons which he gives.

LORD SCARMAN. My Lords, I have had the advantage of studying in draft the speech to be delivered by my noble and learned friend Lord Bridge of Harwich. I agree with it.

For the reasons which he gives I would dismiss the appeal, answering the certified question as he proposes.

LORD BRIDGE OF HARWICH. My Lords, on 23 February 1984 the appellant was convicted at the Crown Court at Reading of two attempts to commit offences. The offences attempted were being knowingly concerned in dealing with (count 1) and in harbouring (count 2) a Class A controlled drug namely diamorphine, with intent to evade the prohibition of importation imposed by section 3(1) of the Misuse of Drugs Act 1971, contrary to section 170(1)(*b*) of the Customs and Excise Management Act 1979. On 5 November 1984 the Court of Appeal (Criminal Division) dismissed his appeal against conviction but certified that a point of law of general public importance was involved in their decision and granted leave to appeal to your Lordships' House. The certified question granted on 13 November 1984 reads:

> "Does a person commit an offence under section 1 of the Criminal Attempts Act 1981 where, if the facts were as that person believed them to be, the full offence would have been committed by him, but where on the true facts the offence which that person set out to commit was in law impossible, e.g., because the substance imported and believed to be heroin was not heroin but a harmless substance?"

The facts plainly to be inferred from the evidence, interpreted in the light of the jury's guilty verdicts, may be shortly summarised. The appellant, on a visit to India, was approached by a man named Desai, who offered to pay him £1,000 if, on his return to England, he would receive a suitcase which a courier would deliver to him containing packages of drugs which the appellant was then to distribute according to instructions he would receive. The suitcase was duly delivered to him in Cambridge. On 30 November 1982, acting on instructions, the

appellant went to Southall station to deliver a package of drugs to a third party. Outside the station he and the man he had met by appointment were arrested. A package containing a powdered substance was found in the appellant's shoulder bag. At the appellant's flat in Cambridge, he produced to customs officers the suitcase from which the lining had been ripped out and the remaining packages of the same powdered substance. In answer to questions by customs officers and in a long written statement the appellant made what amounted to a full confession of having played his part, as described, as recipient and distributor of illegally imported drugs. The appellant believed the drugs to be either heroin or cannabis. In due course the powdered substance in the several packages was scientifically analysed and found not to be a controlled drug but snuff or some similar harmless vegetable matter.

Before examining the issue arising from the certified question, it will be convenient to consider an entirely separate ground of appeal, which was not raised in the Court of Appeal, but which your Lordships permitted counsel for the appellant to argue before the Appellate Committee. Complaint is made of the following passage in the summing up of the trial judge, Judge Pigot. In discussing the meaning of the words "knowingly concerned" in section 170(1)(*b*) of the Act of 1979 he said:

> "The prosecution must prove that the defendants did what they did knowingly. That is to say, it must be proved that they knew the goods were prohibited goods and had been imported into the United Kingdom, although, in the context of this case, they need not know precisely what the prohibited goods were, as long as they knew they were prohibited. There is evidence for you to consider in this case that Mr. Shivpuri particularly knew the nature of the substance. It is a matter for you to decide whether you are sure that he knew or believed the substance was heroin or, in his own expression, dried hash or cannabis (which is also prohibited) or some other prohibited drug. That is what "knowingly" means in the context of this case."

The attack on this passage has two limbs. The first criticises the direction as erroneous in law and raises a point of law of undoubted general importance although it is doubtful whether, in the circumstances of the present case, the point is more than academic. The second criticises the direction on a narrow ground solely with reference to its applicability to the facts of the present case.

In using the words "they need not know precisely what the prohibited goods were, as long as they knew they were prohibited" Judge Pigot was expounding the law to the jury exactly as it was laid down by the Court of Appeal in *Reg. v. Hussain* [1969] 2 Q.B. 567 in relation to offences under section 304 of the Customs and Excise Act 1952 connected with the importation of prohibited goods. In that case the appellant had been convicted of being knowingly concerned in the fraudulent evasion of the prohibition of the importation of cannabis. It was submitted on his behalf that proof of knowledge on his part that the goods being smuggled were cannabis was part of the obligation of the prosecution,

and since the chairman had directed that it was not necessary for the accused to know precisely the nature of the goods, there was a misdirection. Delivering the judgment of the court, Widgery L.J. said, at pp. 571–572:

> "The court is not prepared to accept that submission. It seems perfectly clear that the word "knowingly" in section 304(*b*) is concerned with knowing that a fraudulent evasion of a prohibition in respect of goods is taking place. If, therefore, the accused knows that what is on foot is the evasion of a prohibition against importation and he knowingly takes part in that operation, it is sufficient to justify his conviction, even if he does not know precisely what kind of goods are being imported. It is, of course, essential that he should know that the goods which are being imported are goods subject to a prohibition. It is essential he should know that the operation with which he is concerning himself is an operation designed to evade that prohibition and evade it fraudulently. But it is not necessary that he should know the precise category of the goods the importation of which has been prohibited."

The submission made by counsel for the appellant is that this case and *Reg. v. Hennessey (Timothy)* (1978) 68 Cr.App.R. 419 which followed it should now be overruled. The basis for the submission is that section 170 of the Act of 1979 creates three distinct offences in relation to the importation of prohibited goods according to the category of goods in relation to which the offence was committed. The effect of section 170(3) and (4) and Schedule 1 is that the commission of any offence under section 170(1) or (2) in relation to the importation of drugs of Class A or Class B under the Misuse of Drugs Act 1971 attracts a maximum sentence of 14 years' imprisonment; the commission of any such offence in relation to the importation of drugs of Class C attracts a maximum sentence of five years' imprisonment; and the commission of any such offence in relation to any other category of prohibited goods attracts a maximum sentence of two years' imprisonment. It follows from this, applying the reasoning in *Reg. v. Courtie* [1984] A.C. 463, that each of the three distinct offences has different ingredients and, leaving aside considerations of impossibility arising under the Criminal Attempts Act 1981, part of the actus reus of the offence which must be proved in each case is the importation, actual or attempted, of goods which were in fact of the appropriate category to sustain the offence charged. So far the argument seems to me irrefutable and is not challenged by the Crown. It is the next step in the argument which is the critical one. If each of the three offences involves proof of a different element as part of the actus reus, that is importation of the appropriate category of prohibited goods, it follows, so it is submitted, that "knowingly," wherever it appears in section 170(1) and (2) of the Act of 1979 connotes a corresponding mens rea, that is, knowledge of the importation of goods in the appropriate category. I recognise the force of this submission. The point may be put in the form of a rhetorical question. Can it be supposed that Parliament intended that the mens rea appropriate to an offence carrying a maximum sentence of

two years' imprisonment should equally be sufficient to sustain a conviction for an offence carrying a maximum sentence of 14 years' imprisonment? On the other hand, if the submission for the appellant is right, the task of the prosecution in proving an offence in relation to the importation of prohibited drugs would in many cases be rendered virtually impossible, more particularly since the enactment of the Controlled Drugs (Penalties) Act 1985, which creates a separate category of offences in relation to the importation of drugs of Class A, which now carry a maximum sentence of life imprisonment. By Schedule 2 to the Misuse of Drugs Act 1971 there are about one hundred different drugs listed in Class A, thirteen in Class B, and ten in Class C. An educated layman would know the names of no more than a handful of these: cocaine, diamorphine, morphine, opium and perhaps a few others in Class A; amphetamine, cannabis and codeine in Class B; none that I recognise in Class C. If a man were accused of being knowingly concerned in the importation of methyldesorphine (Class A), what would a jury make of his defence that he believed it to be methylphenidate (Class B) or methaqualone (Class C)?

Fortunately the legislative history provides a clear resolution of these problems. Under section 304 of the Customs and Excise Act 1952 the offences which are now the subject of section 170 of the Act of 1979 were uniformly punishable by a maximum of two years' imprisonment "save where, in the case of an offence in connection with a prohibition or restriction, a penalty is expressly provided for that offence by the enactment or other instrument imposing the prohibition or restriction . . ." No special penalty was imposed by any statute for offences under section 304 of the Act of 1952 in connection with the importation of prohibited drugs until the Dangerous Drugs Act 1967. Section 7(1) of the Act of 1967 increased from two to ten years the maximum sentence of imprisonment which could be imposed for offences under section 304 of the Act of 1952 in connection with the importation of certain drugs, including cannabis, prohibited by the Dangerous Drugs Act 1965. It was against this statutory background that *Reg. v. Hussain* [1969] 2 Q.B. 567 was decided.

The Misuse of Drugs Act 1971 repealed the earlier legislation and enacted a new and comprehensive code intended, one may reasonably suppose, to arm the courts with all the criminal sanctions they would need to counter the growing drugs problem. The Act created, inter alia, the offence of possessing controlled drugs: section 5(2). Different maximum penalties attached to this offence according to whether the drug the subject of the offence was of Class A, B or C: section 25 and Schedule 4. Parliament clearly appreciated the difficulty they would create if it were necessary for the prosecution to prove, on a charge of possession of a drug of a particular class, not only the fact of possession of a drug of that class, but also guilty knowledge that the drug was of that class. Section 28(3) provides:

> "Where in any proceedings for an offence to which this section applies"—which includes an offence under section 5(2)—"it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product

involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—(*a*) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but (*b*) shall be acquitted thereof—(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; . . ."

Thus, on a charge of possessing a Class A drug (maximum seven years) and on proof that the drug in possession of the accused was in fact of Class A, it will be no defence for him to persuade the jury that he believed it to be of Class B (maximum five years) or Class C (maximum two years). In other words the only mens rea required for the offence of possessing a drug in any specified class is knowledge that it was a controlled drug. I have chosen the offence of possession to illustrate the point, but section 28 also applies to a number of other offences where, without such a provision as is found in subsection (3), the almost insurmountable difficulty, to which I have earlier alluded, of proving the appropriate guilty knowledge, would arise. By section 26, on the other hand, the maximum sentences for offences under section 304 of the Customs and Excise Act 1952 connected with the importation of prohibited goods were raised to the limits which we still find in section 170 of and Schedule 1 to the Act of 1979, viz. 14 years in relation to drugs of Class A or Class B, five years in relation to drugs of Class C, and these drug-related importation offences are not made subject to the provisions of section 28(3) or to any other provision to the like effect. The only possible explanation for this is that the Act of 1971 was drafted on the footing that the decision in *Reg. v. Hussain* [1969] 2 Q.B. 567 made any such provision unnecessary. Irrespective of the different penalties attached to offences in connection with the importation of different categories of prohibited goods, *Reg. v. Hussain* established that the only mens rea necessary for proof of any such offence was knowledge that the goods were subject to a prohibition on importation. Had it been decided otherwise, as the appellant submits it should have been, it is surely inconceivable that Parliament, in the Act of 1971, would not have made provision such as that which we see in section 28(3) applicable to drug-related offences connected with importation. It follows, in my opinion, that the decision in *Reg. v. Hussain* has effectively been adopted and endorsed by the legislature and thus remains good law.

As I have already said, the criticism of the passage quoted from the judge's summing up based on the submission that *Reg. v. Hussain* and *Reg. v. Hennessey (Timothy)*, 68 Cr.App.R. 419, ought to be overruled is in a sense academic, in that the prosecution's case against the appellant depended, not on the actual character of the goods in the importation of which the appellant had been concerned, but on what the appellant believed the character of those goods to be. The narrower criticism of the judge's direction concentrates on that aspect of the case.

In such a case, it is submitted, if the prosecution can establish an attempt to commit an offence at all on the basis of the appellant's mistaken belief, the attempted offence under section 170 of the Act of 1979 can only be related to the attempted importation of a drug of Class A or Class B, thus bringing it within the category of offences attracting a maximum penalty of 14 years' imprisonment, if the appellant's mistaken belief was that it was a drug of Class A or Class B. From this it follows, the submission continues, that it was a misdirection to tell the jury that they should convict the appellant if they were sure "that he knew or believed the substance was heroin or, in his own expression, dried hash or cannabis (which is also prohibited) or some other prohibited drug." I think this submission is strictly correct and that the words "or some other prohibited drug" amounted to a technical misdirection. However, I am satisfied it cannot in any way have misled the jury or diverted them from the only issue which, on the evidence, they had to decide. The appellant's defence, which the jury not surprisingly rejected, was that he had himself tested the powdered substance in question, both before and after importation, and found it to be harmless. The case for the Crown depended on his own admissions. These supported the case that at all material times until after his arrest the appellant believed the imported packages to contain either heroin or cannabis. No other drug was ever mentioned. The misdirection occasioned no miscarriage of justice and, so far as this point is concerned, it is a case for the application of the proviso to section 2(1) of the Criminal Appeal Act 1968.

The certified question depends on the true construction of the Criminal Attempts Act 1981. That Act marked an important new departure since, by section 6, it abolished the offence of attempt at common law and substituted a new statutory code governing attempts to commit criminal offences. It was considered by your Lordships' House last year in *Anderton v. Ryan* [1985] A.C. 560 after the decision in the Court of Appeal which is the subject of the present appeal. That might seem an appropriate starting point from which to examine the issues arising in this appeal. But your Lordships have been invited to exercise the power under the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 to depart from the reasoning in that decision if it proves necessary to do so in order to affirm the convictions appealed against in the instant case. I was not only a party to the decision in *Anderton v. Ryan,* I was also the author of one of the two opinions approved by the majority which must be taken to express the House's ratio. That seems to me to afford a sound reason why, on being invited to re-examine the language of the statute in its application to the facts of this appeal, I should initially seek to put out of mind what I said in *Anderton v. Ryan.* Accordingly I propose to approach the issue in the first place as an exercise in statutory construction, applying the language of the Act to the facts of the case, as if the matter were res integra. If this leads me to the conclusion that the appellant was not guilty of any attempt to commit a relevant offence, that will be the end of the matter. But if this initial exercise inclines me to reach a contrary conclusion, it will then be necessary to consider whether the precedent set by *Anderton v. Ryan*

bars that conclusion or whether it can be surmounted either on the ground that the earlier decision is distinguishable or that it would be appropriate to depart from it under the *Practice Statement.*

The Act of 1981 provides by section 1:

> "(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence. (2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible. (3) In any case where—(*a*) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but (*b*) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence. (4) This section applies to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, other than—(*a*) conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment); (*b*) aiding, abetting, counselling, procuring or suborning the commission of an offence; (*c*) offences under section 4(1) (assisting offenders) or 5(1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of the Criminal Law Act 1967."

Applying this language to the facts of the case, the first question to be asked is whether the appellant intended to commit the offences of being knowingly concerned in dealing with and harbouring drugs of Class A or Class B with intent to evade the prohibition on their importation. Translated into more homely language the question may be rephrased, without in any way altering its legal significance, in the following terms: did the appellant intend to receive and store (harbour) and in due course pass on to third parties (deal with) packages of heroin or cannabis which he knew had been smuggled into England from India? The answer is plainly yes, he did. Next, did he in relation to each offence, do an act which was more than merely preparatory to the commission of the offence? The act relied on in relation to harbouring was the receipt and retention of the packages found in the lining of the suitcase. The act relied on in relation to dealing was the meeting at Southall station with the intended recipient of one of the packages. In each case the act was clearly more than preparatory to the commission of the *intended* offence; it was not and could not be more than merely preparatory to the commission of the *actual* offence, because the facts were such that the commission of the actual offence was impossible. Here then is the nub of the matter. Does the "act which is more than merely preparatory to the commission of the offence" in section 1(1) of the Act of 1981 (the actus reus of the statutory offence of attempt) require any more than an act which is more than merely preparatory to the commission of the offence which the defendant intended to commit? Section 1(2) must surely indicate a negative answer; if it were otherwise,

whenever the facts were such that the commission of the actual offence was impossible, it would be impossible to prove an act more than merely preparatory to the commission of that offence and subsections (1) and (2) would contradict each other.

This very simple, perhaps over simple, analysis leads me to the provisional conclusion that the appellant was rightly convicted of the two offences of attempt with which he was charged. But can this conclusion stand with *Anderton v. Ryan?* The appellant in that case was charged with an attempt to handle stolen goods. She bought a video recorder believing it to be stolen. On the facts as they were to be assumed it was not stolen. By a majority the House decided that she was entitled to be acquitted. I have re-examined the case with care. If I could extract from the speech of Lord Roskill or from my own speech a clear and coherent principle distinguishing those cases of attempting the impossible which amount to offences under the statute from those which do not, I should have to consider carefully on which side of the line the instant case fell. But I have to confess that I can find no such principle.

Running through Lord Roskill's speech and my own in *Anderton v. Ryan* [1985] A.C. 560 is the concept of "objectively innocent" acts which, in my speech certainly, are contrasted with "guilty acts." A few citations will make this clear. Lord Roskill said, at p. 580:

> "My Lords, it has been strenuously and ably argued for the respondent that these provisions involve that a defendant is liable to conviction for an attempt even where his actions are innocent but he erroneously believes facts which, if true, would make those actions criminal, and further, that he is liable to such conviction whether or not in the event his intended course of action is completed."

He proceeded to reject the argument. At p. 582 I referred to the appellant's purchase of the video recorder and said: "Objectively considered, therefore, her purchase of the recorder was a perfectly proper commercial transaction." A further passage from my speech proceeded, at pp. 582–583:

> "The question may be stated in abstract terms as follows. Does section 1 of the Act of 1981 create a new offence of attempt where a person embarks on and completes a course of conduct which is objectively innocent, solely on the ground that the person mistakenly believes facts which, if true, would make that course of conduct a complete crime? If the question must be answered affirmatively it requires convictions in a number of surprising cases: the classic case, put by Bramwell B. in *Reg. v. Collins* (1864) 9 Cox C.C. 497, of the man who takes away his own umbrella from a stand, believing it not to be his own and with intent to steal it; the case of the man who has consensual intercourse with a girl over 16 believing her to be under that age; the case of the art dealer who sells a picture which he represents to be and which is in fact a genuine Picasso, but which the dealer mistakenly believes to be a fake. The common feature of all these cases, including that under appeal, is that the mind alone is guilty, the act is innocent."

I then contrasted the case of the man who attempts to pick the empty pocket, saying:

> "Putting the hand in the pocket is the guilty act, the intent to steal is the guilty mind, the offence is appropriately dealt with as an attempt, and the impossibility of committing the full offence for want of anything in the pocket to steal is declared by [subsection (2)] to be no obstacle to conviction."

If we fell into error, it is clear that our concern was to avoid convictions in situations which most people, as a matter of common sense, would not regard as involving criminality. In this connection it is to be regretted that we did not take due note of paragraph 2.97 of the Law Commission's report (Criminal Law: Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) (Law Commission No. 102)) which preceded the enactment of the Act of 1981, which reads:

> "If it is right in principle that an attempt should be chargeable even though the crime which it is sought to commit could not possibly be committed, we do not think that we should be deterred by the consideration that such a change in our law would also cover some extreme and exceptional cases in which a prosecution would be theoretically possible. An example would be where a person is offered goods at such a low price that he believes that they are stolen, when in fact they are not; if he actually purchases them, upon the principles which we have discussed he would be liable for an attempt to handle stolen goods. Another case which has been much debated is that raised in argument by Bramwell B. in *Reg. v. Collins* (1864) 9 Cox C.C. 497. If A takes his own umbrella, mistaking it for one belonging to B and intending to steal B's umbrella, is he guilty of attempted theft? Again, on the principles which we have discussed he would in theory be guilty, but in neither case would it be realistic to suppose that a complaint would be made or that a prosecution would ensue."

The prosecution in *Anderton v. Ryan* itself falsified the Commission's prognosis in one of the "extreme and exceptional cases." It nevertheless probably holds good for other such cases, particularly that of the young man having sexual intercourse with a girl over 16, mistakenly believing her to be under that age, by which both Lord Roskill and I were much troubled.

However that may be, the distinction between acts which are "objectively innocent" and those which are not is an essential element in the reasoning in *Anderton v. Ryan* and the decision, unless it can be supported on some other ground, must stand or fall by the validity of this distinction. I am satisfied on further consideration that the concept of "objective innocence" is incapable of sensible application in relation to the law of criminal attempts. The reason for this is that any attempt to commit an offence which involves "an act which is more than merely preparatory to the commission of the offence" but for any reason fails, so that in the event no offence is committed, must ex hypothesi, from

the point of view of the criminal law, be "objectively innocent." What turns what would otherwise, from the point of view of the criminal law, be an innocent act into a crime is the intent of the actor to commit an offence. I say "from the point of view of the criminal law" because the law of tort must surely here be quite irrelevant. A puts his hand into B's pocket. Whether or not there is anything in the pocket capable of being stolen, if A intends to steal, his act is a criminal attempt; if he does not so intend, his act is innocent. A plunges a knife into a bolster in a bed. To avoid the complication of an offence of criminal damage, assume it to be A's bolster. If A believes the bolster to be his enemy B and intends to kill him, his act is an attempt to murder B; if he knows the bolster is only a bolster, his act is innocent. These considerations lead me to the conclusion that the distinction sought to be drawn in *Anderton v. Ryan* between innocent and guilty acts considered "objectively" and independently of the state of mind of the actor cannot be sensibly maintained.

Another conceivable ground of distinction which was to some extent canvassed in argument, both in *Anderton v. Ryan* and in the instant case, though no trace of it appears in the speeches in *Anderton v. Ryan,* is a distinction which would make guilt or innocence of the crime of attempt in a case of mistaken belief dependent on what, for want of a better phrase, I will call the defendant's dominant intention. According to the theory necessary to sustain this distinction, the appellant's dominant intention in *Anderton v. Ryan* was to buy a cheap video recorder; her belief that it was stolen was merely incidental. Likewise in the hypothetical case of attempted unlawful sexual intercourse, the young man's dominant intention was to have intercourse with the particular girl; his mistaken belief that she was under 16 was merely incidental. By contrast, in the instant case the appellant's dominant intention was to receive and distribute illegally imported heroin or cannabis.

Whilst I see the superficial attraction of this suggested ground of distinction, I also see formidable practical difficulties in its application. By what test is a jury to be told that a defendant's dominant intention is to be recognised and distinguished from his incidental but mistaken belief? But there is perhaps a more formidable theoretical difficulty. If this ground of distinction is relied on to support the acquittal of the appellant in *Anderton v. Ryan,* it can only do so on the basis that her mistaken belief that the video recorder was stolen played no significant part in her decision to buy it and therefore she may be acquitted of the intent to handle stolen goods. But this line of reasoning runs into head-on collision with section 1(3) of the Act of 1981. The theory produces a situation where, apart from the subsection, her intention would not be regarded as having amounted to any intent to commit an offence. Section 1(3)(*b*) then requires one to ask whether, if the video recorder had in fact been stolen, her intention would have been regarded as an intent to handle stolen goods. The answer must clearly be yes, it would. If she had bought the video recorder knowing it to be stolen, when in fact it was, it would have availed her nothing to say that her dominant intention was to buy a video recorder because it was cheap and that her

knowledge that it was stolen was merely incidental. This seems to me fatal to the dominant intention theory.

I am thus led to the conclusion that there is no valid ground on which *Anderton v. Ryan* can be distinguished. I have made clear my own conviction, which as a party to the decision (and craving the indulgence of my noble and learned friends who agreed in it) I am the readier to express, that the decision was wrong. What then is to be done? If the case is indistinguishable, the application of the strict doctrine of precedent would require that the present appeal be allowed. Is it permissible to depart from precedent under the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 notwithstanding the especial need for certainty in the criminal law? The following considerations lead me to answer that question affirmatively. First, I am undeterred by the consideration that the decision in *Anderton v. Ryan* was so recent. The *Practice Statement* is an effective abandonment of our pretention to infallibility. If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better. Secondly, I cannot see how, in the very nature of the case, anyone could have acted in reliance on the law as propounded in *Anderton v. Ryan* in the belief that he was acting innocently and now find that, after all, he is to be held to have committed a criminal offence. Thirdly, to hold the House bound to follow *Anderton v. Ryan* because it cannot be distinguished and to allow the appeal in this case would, it seems to me, be tantamount to a declaration that the Act of 1981 left the law of criminal attempts unchanged following the decision in *Reg. v. Smith* [1975] A.C. 476. Finally, if, contrary to my present view, there is a valid ground on which it would be proper to distinguish cases similar to that considered in *Anderton v. Ryan,* my present opinion on that point would not foreclose the option of making such a distinction in some future case.

I cannot conclude this opinion without disclosing that I have had the advantage, since the conclusion of the argument in this appeal, of reading an article by Professor Glanville Williams entitled "The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes?" [1986] C.L.J. 33. The language in which he criticises the decision in *Anderton v. Ryan* is not conspicuous for its moderation, but it would be foolish, on that account, not to recognise the force of the criticism and churlish not to acknowledge the assistance I have derived from it.

I would answer the certified question in the affirmative and dismiss the appeal.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends the Lord Chancellor and Lord Bridge of Harwich. I agree with the disposal of this appeal proposed by my noble and learned friend Lord Bridge. On the relatively minor point referred to in the speech of the Lord Chancellor in which he differs from Lord Bridge I agree

with the Lord Chancellor's view. Otherwise I agree with the reasons given by my noble and learned friend, Lord Bridge.

Appeal against conviction dismissed. Costs of appellant and respondent to be paid out of central funds.

Solicitors: Francis & Co., Cambridge; Solicitor, Customs and Excise.

C. T. B.

[HOUSE OF LORDS]

SOUTH CAROLINA INSURANCE CO. . . . RESPONDENTS

AND

ASSURANTIE MAATSCHAPPIJ "DE ZEVEN PROVINCIEN" N.V. . . . . APPELLANTS

SOUTH CAROLINA INSURANCE CO. . . . RESPONDENTS

AND

AL AHLIA INSURANCE CO. AND ANOTHER . . APPELLANTS

1986 May 6, 7; July 29

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Brightman, Lord Mackay of Clashfern and Lord Goff of Chieveley

Injunction—Jurisdiction to grant—Foreign proceedings—Action brought in England—Defendants lodging petition in United States court for pre-trial discovery—Whether defendants to be restrained from proceeding with petition under court's inherent jurisdiction

The plaintiffs were an American insurance company, and, having reinsured the liability of another American insurance company, U.N.I., they reinsured the risk with the defendants in London. The plaintiffs claimed under the contract of reinsurance and, when the defendants disputed liability, they brought proceedings in the Commercial Court. Before the defence was served, the defendants lodged a petition in a United States district court seeking, inter alia, an order for pre-trial discovery of documents relevant to the claim and the plaintiffs' contract of reinsurance with U.N.I., against persons resident in the United States, who were not parties to the English action. On the plaintiffs' application in the Commercial Court, the judge made an order restraining the defendants from taking any further step in the American proceedings or enforcing any order made therein. On appeal by the defendants, the Court of Appeal dismissed the appeal.

On appeal by the defendants:—

Held, allowing the appeal, that although the power of the High Court to grant injunctions, which was a statutory power conferred by section 37(1) of the Supreme Court Act 1981, was very wide it was limited, save for two exceptions irrelevant to the present proceedings, to the situations (Lord Mackay of Clashfern and Lord Goff of Chieveley dubitante) (i) where one party to an action could show that the other party had either invaded, or threatened to invade, a legal or equitable right of the former for the enforcement of which the latter was amenable to the jurisdiction of the court, and (ii) where one party to an action had behaved, or threatened to behave, in an unconscionable manner; that in the circumstances the plaintiffs had failed to show either that the defendants' conduct towards the plaintiffs was amenable to the jurisdiction of the court, or that it was unconscionable in the sense that it interfered with the due process of the High Court's jurisdiction, and that, accordingly, the injunctions granted would be discharged (post, pp. 31C–D, 39H—40D, 41A–D, 44A–B, C–D, E, F).

Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210, H.L.(E.); *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, H.L.(E.) and *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, H.L.(E.) applied.

Per Lord Goff of Chieveley. I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute and it is impossible at the present time to foresee every circumstance in which it may be thought right to make the remedy available (post, p. 44G).

Decision of the Court of Appeal [1986] Q.B. 348; [1985] 3 W.L.R. 739; [1985] 2 All E.R. 1046 reversed.

The following cases are referred to in their Lordships' opinions:

Bank of Tokyo Ltd. v. Karoon (*Note*), post, p. 45; [1986] 3 W.L.R. 414; [1986] 3 All E.R. 468, C.A.

British Airways Board v. Laker Airways Ltd. [1985] A.C. 58; [1984] 3 W.L.R. 413; [1984] 3 All E.R. 39, H.L.(E.)

Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.)

Court of Commissioner of Patents for Republic of South Africa, In re (1980) 88 F.R.D. 75

Deere (John) Ltd. and Deere & Co. v. Sperry Corporation (1985) 754 F. 2d 132

MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.)

Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.)

The following additional cases were cited in argument:

Armstrong v. Armstrong [1892] P. 98

Erhmann v. Ehrmann [1896] 2 Ch. 611, C.A.

Mike Trading and Transport Ltd. v. R. Pagnan & Fratelli (The Lisboa) [1980] 2 Lloyd's Rep. 546, C.A.

North Carolina Estate Co. Ltd., In re (1889) 5 T.L.R. 328

Straker Brothers & Co. v. Reynolds (1889) 22 Q.B.D. 262

Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2), In re [1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434, H.L.(E.)

APPEAL from the Court of Appeal.

This was an appeal by leave of the House of Lords (Lord Scarman, Lord Templeman and Lord Mackay of Clashfern) dated 19 November 1985 by the defendants, Assurantie Maatschappij "De Zeven Provincien" N.V., in the first action, and by the first defendants, Al Ahlia Insurance Co., and by the second defendants, Arabian Seas Insurance Co. Ltd., in the second action brought by the plaintiffs, South Carolina Insurance Co. from the judgment dated 23 May 1985 of the Court of Appeal (Griffiths, Slade and Lloyd L.JJ.) which affirmed orders made on 25 April 1985 by Hobhouse J., the effect of which was to restrain the defendants from taking any further steps in proceedings before a Federal District Court of the United States for production and inspection of documents against a number of companies and individuals not party to the present actions.

The facts are set out in the opinion of Lord Brandon of Oakbrook.

Robert Alexander Q.C. and *Jonathan Sumption Q.C.* for the defendants. The point raised by this appeal is novel. The question can be stated in this way: in what circumstances (if any) may the English courts restrain a party to an English action from availing himself of the process of a foreign court for the purpose of obtaining evidence relevant to the English action? The most authoritative decisions in this branch of the law are those of this House in *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210; *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 and *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58.

In the present case the defendants against whom injunctive relief is sought availed themselves of a right open to them under the federal law of the United States and applied to a United States district court for an order requiring persons resident in the United States, but who were not parties to the English proceedings, to give pre-trial discovery of documents relevant to the English action. The particular issue, therefore, in this appeal is whether in the present circumstances it is right for the English court to restrain the defendants from prosecuting further the proceedings in the United States district court.

The rules of procedure in England provide a means whereby discovery can be obtained between parties to an action and witnesses can be subpoenaed to appear at the trial with relevant documents in their possession. The rules of procedure do not provide an exhaustive or exclusive code which prohibit a party from obtaining documents in any way other than those provided by the rules. For example, if a stranger to the action is prepared to give documents voluntarily to a party, that party is entitled to receive them without obtaining a subpoena. Further, a party may use the facilities of the courts of a friendly foreign state if that state is willing for them so to do. The defendants concede that

A there are limits to this principle. Thus, it is inapplicable where it would be unconscionable for a party to obtain discovery, for example, of documents which in this country are subject to professional privilege.

The documents sought are relevant to the defences pleaded in the action which in turn reflect enquiries which were pursued before the action was brought. The plaintiffs obtained the injunction in spite of refusing the defendants consent to have access to the documents in B question. Since then they have granted the defendants access but it is the view of the defendants' solicitors that the strangers to the action have not made proper disclosure. The documents are not in the power or possession or control of the plaintiffs; therefore it is difficult to see why they object to disclosure. If the strangers to the action were in this country they could be required to produce the documents by subpoena C duces tecum. As to any suggestion that the defendants could have applied for letters rogatory under R.S.C., Ord. 39, r. 2, the procedure is cumbersome and expensive and they can be issued only where other efforts have been made to obtain the documents in question.

As stated previously, after the Court of Appeal gave judgment the plaintiffs did arrange for the defendants to have controlled access to certain documents in the possession of certain third parties resident in D the United States. This was a facility which the defendants hoped would make the prosecution of the present appeal unnecessary. However, the restrictions imposed upon the defendants' inspection of documents made the facilities which were offered to them most unsatisfactory. They have therefore with regret concluded that certain documents have been withheld in a manner which can be remedied only by the compulsory E procedure of the United States district court.

28 United States Code, section 1782, is a clear provision enabling parties to an English action to obtain from the courts of the United States documents for use in proceedings in this country. That being the rule, the question then arises: on what principle should the English court prevent disclosure where the United States courts would allow disclosure directed to a company which is subject to the jurisdiction of the United F States courts? It is the plaintiffs' contention that in the circumstances it is unconscionable for the defendants to apply for disclosure of these documents. The Court of Appeal held that in principle a party to litigation in this country should not avail itself of 28 United States Code, section 1782, against non-parties resident in the United States.

Reliance is placed on the following propositions: (i) In principle it is G open to the defendants to seek material to enable them to conduct their case and to obtain that material as early as possible. A party can gather evidence for use in litigation either through the use of English procedures or through other means. (ii) There is no objection to these other means including means provided by United States proceedings. This does not, as the Court of Appeal suggested, deprive the English court of control over the proceedings. (iii) Caution is required before the conduct of any H foreign proceedings is restrained. (iv) The use of the United States processes could be restrained by injunction if it involved the breach of some legal or equitable right of the party claiming the injunction or was unjust or unconscionable to that other party but not otherwise. The

defendants dissent from the general approach of the Court of Appeal in the present case.

As to the authorities, reliance is placed on *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210, 211C–D, 255F–G, 256E–257, *per* Lord Diplock. As to *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, see *per* Lord Scarman, at pp. 572F–G, and 574D. It is to be noted that that was a forum conveniens case. In *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, the observations of Lord Diplock at pp. 80A–B et seq., and Lord Scarman at p. 95C, show that the category of cases there under discussion have no relevance to the issue in the present case. The defendants would apply by analogy to the present case the observations of Dunn L.J. in *Mike Trading and Transport Ltd. v. R. Pagnan & Fratelli (The Lisboa)* [1980] 2 Lloyd's Rep. 546, 551.

On the facts of the present case it is not unreasonable or unjust for the defendants to apply for the documents in question. It is said that the documents would be obtained earlier than if they were obtained by subpoena in the English proceedings. But this is only a quirk of English procedure. The advantage of being able to obtain the documents at an earlier stage of the proceedings is in no way unconscionable to the plaintiffs. This is particularly so since otherwise they are not likely to be obtained at all. The defendants do not accept that the procedure by way of letters rogatory is open to them. Further, it is an expensive procedure. It cannot be unjust or unconscionable for the defendants to take the "direct route" for obtaining these documents.

As to the United States authorities cited by Griffiths L.J. [1986] Q.B. 348, 357, those authorities are not contemplating the situation which has arisen in the present case. The principles laid down by the Court of Appeal here it may be said to act unconscionably against the defendants rather than the plaintiffs. [Reference was also made to *In re North Carolina Estate Co. Ltd.* (1889) 5 T.L.R. 328; *Straker Brothers & Co. v. Reynolds* (1889) 22 Q.B.D. 262, and *Bank of Tokyo Ltd. v. Karoon (Note)* [1987] A.C. 45.]

Kenneth Rokison Q.C., Christopher Symons and *Thomas Weitzman* for the plaintiffs. Attention is drawn to the width of the inquiry requested by the defendants in the United States proceedings. They are seeking third party discovery which would not be allowed at all in England. The United States court will not allow that which would not be allowed by the court hearing the substantive issue between the parties. The defendants are in effect seeking to take part of the English proceedings out of the jurisdiction and control of the English court. The difference between the disclosure of documents as a result of letters of request and the present case is that the defendants here have first gone to the foreign court and requested that court to make an order in English proceedings.

In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2) [1978] A.C. 547, is the antithesis of the present case. The House there held that an English court will not, even when so requested by a foreign court, make an order in respect of an English person or company requiring that person or company to give

documentary or testamentary discovery for the purposes of the foreign proceedings. The present case is the reverse position since although the American court is being asked to assist the English court, the American court is being asked to admit a wider class of documents than is allowable under English procedure. It is thus an even stronger case than the *Westinghouse* case. The correct way for the defendants to proceed in the present issue is under R.S.C., Ord. 39, r. 1. Further, Ord. 38, r. 9 specifically relates to depositions in any cause or matter and links them to those under Ord. 39, r. 1.

The approach of Griffiths L.J. in the Court of Appeal is adopted. The plaintiffs are prejudiced by the American procedure because the defendants can obtain documents which could not be obtained under English procedure. Further, the plaintiffs are necessarily prejudiced by the costs and expense of the American proceedings for they are bound to take part in those proceedings to protect their interests. The question also arises whether, if the English court would not make an order for third party discovery as sought by the defendants, the American court would make any order at all. It is plain from the American decisions in *In re Court of Commissioner of Patents for Republic of South Africa* (1980) 88 F.R.D. 75, 77, and *John Deere Ltd. and Deere & Co. v. Sperry Corporation* (1985) 754 F. 2d 132, 135, 136, that a United States court will only grant an applicant an order under 28 United States Code, section 1782, if it is satisfied that an order of the same nature would be made in like circumstances by the foreign court seised of the dispute at that stage of the proceedings. The effect of those decisions is that any American court properly advised as to English law on discovery would deny the defendants' request as being for third party discovery which is not allowable under English procedure. If it be said that this question can be left for the United States district court to decide, the answer is that it is better for the English court to deal with the matter and "nip it in the bud." It may be that the United States court would not be properly advised as to the relevant English law.

The English court has jurisdiction to restrain a party to proceedings pending in England from seeking or continuing to seek interlocutory orders in a foreign jurisdiction for the purposes of those proceedings. The English court has an inherent jurisdiction to control its own proceedings. Further, it is well established that where proceedings are pending before the English court, and proceedings are brought in a foreign jurisdiction which concern the same issues, the English court has a discretionary jurisdiction either to stay the English proceedings or to restrain by injunction a party to those proceedings from continuing to proceed in the foreign court. This jurisdiction was recognised by this House in *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 80D–F *per* Lord Diplock. This jurisdiction is commonly invoked in the so-called "forum conveniens" cases, where there is a choice of forum for determination of substantive issues between the parties. See *per* Lord Scarman, at p. 95D. This jurisdiction must also exist where the foreign proceedings are of a purely interlocutory nature, but which overlap with the normal interlocutory processes before the English court. Indeed, it is an obvious and an "a fortiori" case. Thus here the United States

proceedings are only ancillary proceedings and therefore there is no reason why the English court should not have granted the injunction appealed against. A

The Lisboa [1980] 2 Lloyd's Rep. 546 is distinguishable because that was a case where proceedings were started in Venice in order to obtain security if the action was subsequently instituted in Italy. That case cannot be described as one of a foreign court's interlocutory jurisdiction being invoked in English proceedings. It was not an interlocutory application for the purposes of English proceedings. The line of cases cited by Robert Goff L.J. in *Bank of Tokyo Ltd. v. Karoon (Note)* [1987] A.C. 45, is closer to the present case. The present case is one where it is proper to grant an injunction to protect the jurisdiction of the English court. B

Armstrong v. Armstrong [1892] P. 98 lays down the correct approach to the present problem; the principles stated there are applicable to the present case. The essential question is: who should have control over the present matter? The true answer is that it should be the English court which should have control. C

Suppose that in the present case the plaintiffs had attempted in the United States Court to obtain pre-trial depositions from the defendants' employees. Such an application would surely be restrained because it would be so alien to English procedure. So also third-party discovery is alien to English procedure. The matter can be tested by the following example. If a party went to an English court and asked it to issue letters rogatory in relation to third parties' documents under Order 39, such an application would be dismissed. If the party then went to the United States court and requested it under 28 United States Code, section 1782, the English court should intervene on the ground that it was vexatious; the party having failed before the English court, it cannot obtain the evidence by utilising a foreign jurisdiction. But the answer cannot be any different merely because the party in question goes to the United States court first as in the present case. D E

Erhmann v. Ehrmann [1896] 2 Ch. 611, shows that the English court will not grant letters rogatory except in relation to evidence which is directly relevant to the issues in the case. Wider "discovery" will not be made the subject of letters rogatory—let alone in respect of documents held by a third party. F

In conclusion, it is the plaintiffs' contention that they have a legal or equitable right which it is appropriate for the English court to protect by injunction, namely the right, as parties to proceedings in the English court, to have those proceedings conducted in accordance with the procedural laws and practices of England, and of no other jurisdiction. Moreover, it is their contention that the defendants' application for interlocutory relief in the United States is unconscionable and unjust to the plaintiffs. If granted, it would allow the defendants to take advantage of procedural steps and remedies available under English procedural law, while at the same time avoiding some of the restrictions on those steps and remedies which would nevertheless continue to impinge upon the plaintiffs. G H

Symons followed.

Alexander Q.C. in reply. In the present case it is accepted that there is an advantage under the foreign proceedings which cannot be obtained in the English proceedings. It is this factor which distinguishes the present case from *Armstrong v. Armstrong* [1892] P. 98, as applied by Robert Goff L.J. in the *Tokyo Bank* case *(Note)* [1987] A.C. 45. The defendants rely on the principle on which they opened this appeal, namely, that the plaintiffs can only succeed if they can show that the defendants' application before the United States court is unconscionable. As to the principle adumbrated by Griffiths L.J. below, the manner in which a party gathers evidence is for that party. It may gather it voluntarily or in pursuance of a contract. These methods do not deprive the English court in any way of control of its own proceedings.

[Reference was also made to *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 1 and 2)* [1978] A.C. 547, 562B–F.]

Their Lordships took time for consideration.

29 July. Lord Bridge of Harwich. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Brandon of Oakbrook, with which I agree, I would allow this appeal.

Lord Brandon of Oakbrook. My Lords, the question for decision in this appeal is a novel one and can be stated in this way. An action between A and B is pending before an English court. While it is pending B, exercising a statutory right potentially available to him under the federal law of the United States, applies to a district court of the United States for an order that persons resident in the United States, who are not parties to the action before the English court, should give him pre-trial discovery of documents relevant to the issues in that action. In those circumstances, is it right for the English court, on the application of A, to grant an injunction against B prohibiting him from prosecuting further his proceedings in the United States district court? Hobhouse J. at first instance, and the Court of Appeal (Griffiths, Slade and Lloyd L.JJ.) on appeal from him, have held that it is right for such an injunction to be granted. The parties enjoined (for in the instant case there are three of them) now bring a further appeal with the leave of your Lordships' House.

The background of the case is to be found in what can conveniently be described as a three-tier insurance arrangement. The company which first insured the relevant risks was a United States company, United National Insurance Co. ("United National"). United National re-insured the risks which it had insured with another United States company, South Carolina Insurance Co. ("South Carolina"). South Carolina in turn re-re-insured the risks which it had re-insured with a number of other insurance companies in the London market. These other insurance companies included a Dutch company, Assurantie Maatschappij "De Zeven Provincien" (Seven Provinces) and two Middle or Far Eastern companies, Al Ahlia Insurance Co. ("Al Ahlia") and Arabian Seas Insurance Co. ("Arabian Seas"). In or about 1984 South Carolina called

upon Seven Provinces, Al Ahlia and Arabian Seas to pay substantial sums which South Carolina claimed to be due from them under the contracts of re-re-insurance concerned. Seven Provinces, Al Ahlia and Arabian Seas refused to make the payments asked for, denying that they were liable to do so.

As a result South Carolina brought two actions in the Commercial Court here in order to recover the sums which they claimed to be payable, together with interest on such sums. In the first action, which was begun on 12 December 1984, Seven Provinces is the sole defendant. In the second action, which was begun on 28 February 1985, Al Ahlia is the first defendant and Arabian Seas is the second defendant. It was the original intention of the solicitors acting for South Carolina to seek summary judgment in both actions under R.S.C., Order 14. However, at an application to fix a date for the hearing of the Order 14 proceedings against Seven Provinces, counsel for the latter indicated that a number of substantial defences would be raised to South Carolina's claim. These defences included (1) misrepresentation or non-disclosure regarding the retention position on the part of South Carolina; (2) non-disclosure of a previous bad loss record on the business concerned; (3) excessive deductions from premiums; and (4) payment of claims outside the limits of the relevant treaty.

The underwriting agent for United National through whom business was placed with it was Pacific General Agency Inc. ("P.G.A."). The loss adjusters who investigated the claims made against United National were Arthur Campbell-Husted and Co. ("Campbell-Husted"). The principal place of business of both P.G.A. and Campbell-Husted is in the State of Washington.

My Lords, Seven Provinces, Al Ahlia and Arabian Seas ("the re-re-insurers") are, by reasons of their position, remote from the facts in dispute, and obliged to rely for detailed information about them on such documents as they can obtain from South Carolina or P.G.A. and Campbell-Husted. The latter two, however, were not the agents of South Carolina in connection with the relevant transactions; it follows that discovery of documents by South Carolina in the two actions in England would not extend to relevant documents held by them. In this situation, if the re-re-insurers are to achieve their legitimate object of inspecting and copying where necessary, relevant documents held by P.G.A. and Campbell-Husted, some other means have to be found to enable them to do so.

In November 1984, after South Carolina had put forward its claims against the re-re-insurers, but before the two actions in England were begun, the latter had asked P.G.A. if they could inspect the documents in which they were interested at Seattle on 7 December 1984. P.G.A. referred the request to their principal, United National, which in turn consulted South Carolina. It appears that, on the advice of South Carolina's English solicitors, the request for inspection was, in effect, refused. The two actions in England were subsequently begun.

My Lords, 28 United States Code, section 1782, provides:

> "Assistance to foreign and international tribunals and to litigants before such tribunals. (a) The district court of the district in

which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or in part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure."

On 28 March 1985, before the re-re-insurers had served their points of defence and counterclaim in the two actions against them in England, they applied by motion to the district court of the United States, Western District of Washington, at Seattle, for an order under section 1782 above. The motion, the title of which referred to the two actions in England, asked for an order against P.G.A. and Campbell-Husted involving two matters. The first matter was the production and inspection of numerous specified classes of documents of the kind which could reasonably be expected to have come into being in the course of the transaction of the insurance business which had led to United National, having settled claims itself, to recover from South Carolina as its re-insurers, and to South Carolina then claiming to recover over from the re-re-insurers. The second matter was the appearance of three named persons from P.G.A. and Campbell-Husted to give testimony by deposition. The motion was supported by a memorandum and an affidavit.

Notice of the re-re-insurers' motion was served on P.G.A. and Campbell-Husted. South Carolina was also served with notice of the motion, or otherwise made aware of its having been lodged. Neither P.G.A. nor Campbell-Husted appeared before the district court to resist the application. South Carolina, however, did so appear, and having indicated their objection to it, was given until 29 April 1985 to file its affidavit in opposition. It is to be inferred from the foregoing that neither P.G.A. nor Campbell-Husted objects to producing the documents listed in the motion for inspection, and where necessary for copying, by the re-re-insurers, and that it is only the objection of South Carolina that has stood in the way of their doing so.

On 24 April 1985, before the date fixed for filing its affidavit in opposition in the United States district court, South Carolina issued summonses in the two actions in England. By their summonses South Carolina sought (1) an order that the re-re-insurers should withdraw their application to the United States district court, (2) an injunction

restraining the re-re-insurers from proceeding further with such application, and (3) a declaration that the application was an abuse of the process of the English court.

My Lords, the summonses were heard by Hobhouse J. on 25 April 1985. He declined to make the declaration asked for, but granted South Carolina injunctions restraining the re-re-insurers until further order from taking any further steps in their motion before the United States district court and from enforcing any order made by that court on such motion. The main ground on which Hobhouse J. decided to grant such injunctions appears from pp. 10 and 11 in Appendix I to the printed case. Having set out what he called the framework of the matter, he said:

> "It involves a question of principle as to whether or not the English court should retain the control of its own procedure and the proceedings that are before it. I have no doubt that the answer to be given to that question is that the English court should retain that control."

The decision of Hobhouse J. was, as I indicated earlier, affirmed by the Court of Appeal [1986] Q.B. 348. Griffiths L.J. gave the principal judgment, with which Slade and Lloyd L.JJ. both agreed. The main reason which Griffiths L.J. gave for his decision was similar to that relied on by Hobhouse J. He said, at p. 358:

> "Once the parties have chosen or accepted the court in which their dispute is to be tried they must abide by the procedure of that country and that court must be master of its own procedure. Litigation is expensive enough as it is, and if a party fighting a case in this country has to face the prospect of fighting procedural battles in whatever other jurisdiction his opponent may find a procedural advantage it may impose intolerable burdens, and encourage the worst and most oppressive form of procedural forum shopping. We should set our face against any such situation developing.
>
> "Severe dislocation to the timetable of the English litigation is a readily foreseeable consequence of unrestrained access to foreign procedural remedies. This is likely to cause hardship or inconvenience not only to the other party to that litigation but will also affect other litigants whose cases are listed upon forecasts dependent upon litigation being conducted in accordance with our own rules of procedure. As the judge said, the court will lose control of its own proceedings. Furthermore, one party might be able to gain a very unfair advantage in the English procedure if he was able to take the deposition of and cross-examine a witness whom he would never call on his own behalf at the trial, for example, the employees or business associates of his opponent. I think Mr. Sumption [counsel for the re-re-insurers] recognised this when he said he would be content to accept the stay in respect of his application to take the depositions of the witnesses from P.G.A. and Arthur Campbell-Husted & Co. I am therefore satisfied that as a matter of principle the court must have an inherent jurisdiction to make any necessary

order to ensure that the litigation is conducted in accordance with its own procedures."

My Lords, before examining the question whether Hobhouse J. and the Court of Appeal were right or wrong to grant the injunctions now appealed against, it is necessary to draw attention to a number of preliminary matters.

The first matter to which attention needs to be drawn is the existence of an essential difference between the civil procedures of the High Court in England on the one hand, and of courts of the United States on the other, with regard to what may be compendiously described as pre-trial discovery. Under the civil procedure of the High Court in England, pre-trial discovery may take two forms. The first form, which is far and away the more common, is by way of disclosure and inspection of relevant documents under R.S.C., Ord. 24. The second form, which is comparatively rare, is by way of the asking and answering on oath of interrogatories under R.S.C., Ord. 26. Such discovery is, however, subject to two important limitations, one relating to its scope and the other to the stage of an action at which it normally takes place. So far as the scope of discovery is concerned, it is limited to the disclosure and inspection of documents in the possession or power of the parties to the action, or to the asking and answering on oath of interrogatories as between such parties. So far as the stage of an action at which discovery normally takes place is concerned, it is the general rule that the two forms of discovery to which I have referred do not take place until the formal pleadings by both sides have been completed and the issues in disputes thereby fully and clearly defined. In this connection, however, it is right to say that the court has power to order either form of discovery at any stage of an action, including a stage earlier than the completion of pleadings; but such power is rarely exercised and then only on special grounds, for instance when discovery is needed in order that justice may be done in interlocutory proceedings.

Because of the first limitation to which I have referred, there is no way in which a party to an action in the High Court in England can compel pre-trial discovery as against a person who is not a party to such action, either by way of the disclosure and inspection of documents in his possession or power, or by way of giving oral or written testimony. I would, however, stress the word "compel" which I have used in the preceding sentence, for there is nothing to prevent a person who is not a party to an action from voluntarily giving to one or other or both parties to it either disclosure and inspection of documents in his possession or oral or written testimony.

The procedure of the High Court in England, while not enabling parties to an action to compel pre-trial discovery as against a person who is not a party to such action, nevertheless affords ample means by which such a person, provided that he is within the jurisdiction of the court, can be compelled either to give oral testimony, or to produce documents in his possession or power, at the trial of the action itself. Under R.S.C., Ord. 38, Part II, such a person may be compelled to give oral testimony at the trial by the issue and service on him of a subpoena

ad testificandum, or to produce documents in his power or possession (so long as they are adequately described and defined) by the issue and service on him of a subpoena duces tecum. The issue of such subpoenas is in the first instance a ministerial rather than a judicial act, and a party may therefore issue subpoenas of either kind as he thinks fit; the court, however, has power to set aside any subpoena on proper grounds, for instance, irregularity of form, irrelevance, oppressiveness or abuse of the process.

The procedure of the High Court in England includes a further power of the court, conferred on it by R.S.C., Ord. 38, r.13, to order any person to attend any proceedings in a cause or matter and produce any document to be specified or described in the order, the production of which appears to the court to be necessary for the purpose of that proceeding. It has, however, long been established that this rule is not intended to be used, and cannot properly be used, to enable a party to an action to obtain pre-trial disclosure and inspection of documents in the possession or power of a person who is not a party to such action. It is a rule of limited application, involving the production of a document or documents to the court itself rather than to either of the parties to an action.

My Lords, the civil procedure of courts in the United States differs essentially from that in the High Court in England in that under it parties to an action can compel, as against persons who are not parties to it, a full measure of pre-trial discovery, including both the disclosure and production for inspection and copying of documents, and also the giving of oral or written testimony. This power of compulsion can be, and regularly is, used at an early stage of an action.

The second matter to which attention needs to be drawn is that 28 United States Code, section 1782, as appears from its terms which I set out earlier, expressly provides that an order made under it may prescribe the practice and procedure, which may be in whole or in part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing; and that, to the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Procedure.

Reference was made in the two courts below and again in your Lordships' House to certain United States authorities which bear on the exercise of a district court's powers under section 1782. In a decision of the United States District Court of Pennsylvania, *In re Court of the Commissioner of Patents for Republic of South Africa* (1980) 88 F.R.D. 75, 77, Judge Newcomer said:

> "[1, 2] It is of great concern to this court that counsel for opponent has not been able to represent to this court that the documents and testimony for which opponents request a discovery order are discoverable under South African law. Indeed, discussions with counsel lead this court to suspect that these materials would *not* be available through South African procedures. Clearly, this court should not by its exercise of the discretion allowed it under section

A 1782 allow litigants to circumvent the restrictions imposed on discovery by foreign tribunals. Few actions could more significantly impede the development of international co-operation among courts than if the courts of the United States operated to give litigants in foreign cases processes of law to which they are not entitled in the appropriate foreign tribunals."

B Further in *John Deere Ltd. and Deere & Co. v. Sperry Corporation* (1985) 754 F.2d 132, 135, Judge Garth, giving the judgment of the United States Court of Appeals for the Third Circuit, said:

"As a co-operative measure, section 1782 cannot be said to ignore those considerations of comity and sovereignty that pervade international law. A grant of discovery that trenched upon the C clearly established procedures of a foreign tribunal would not be within section 1782."

My Lords, it was contended for South Carolina, on the basis of these authorities, that the re-re-insurers' application to the district court of the United States was bound to fail. The ground relied on was that, since the procedure of the High Court in England did not enable parties to an D action to compel pre-trial discovery against persons not parties to it, the district court would not permit the re-re-insurers to circumvent that limitation by granting them an order for such discovery under section 1782.

It appears to me that there may well be considerable force in this contention. It is not possible, however, for your Lordships, on the limited material before you, to decide for yourselves in advance how the E United States district court would see fit to exercise the discretion conferred on it by section 1782, in the particular circumstances of this case, and having regard to the characteristics of civil procedure in the High Court in England which I endeavoured to summarise earlier.

The third matter to which attention needs to be drawn concerns certain changes in the positions of the parties which have occurred since F the original hearing of South Carolina's two summonses before Hobhouse J. The first change of position relates to the memorandum lodged in support of the re-re-insurers' application to the United States district court, in which they asserted:

"As evidenced by the attached affidavit of Francis Otley Mackie the petitioners herein are seeking this court's assistance in obtaining information and documentation which is necessary, material and G relevant to litigation pending in the courts of England for use in those proceedings. The affidavit further establishes that were all the parties residents of England, the requested discovery would be permitted pursuant to the rules of procedure and discovery in England. Accordingly, the petitioners' motion for taking of testimony and the production of documents should be granted."

H Mr. Mackie, whose affidavit is referred to at the beginning of the above passage, is a partner in the firm of solicitors acting for the re-re-insurers in the two actions in England. The relevant part of that affidavit is paragraph 12, in which Mr. Mackie deposed, inter alia, as follows:

"Discovery of such documentation and testimony is permitted according to the English rules of procedure . . . . Petitioners would be able to obtain writs of subpoena duces tecum issued by the High Court of England . . . directing these entities to produce the documents requested and directing them individually to appear and give testimony at depositions."

These statements in the re-re-insurers' memorandum and Mr. Mackie's affidavit were criticised by Hobhouse J. and by Griffiths L.J. in the Court of Appeal as giving such an incomplete and inaccurate account of the procedure of the High Court in England with regard to discovery as seriously to mislead the United States district court. Griffiths L.J., however, expressly acquitted Mr. Mackie of any deliberate intention to mislead. Before your Lordships Mr. Robert Alexander, who appeared as leading counsel for the appellant re-re-insurers, accepted unreservedly that the passages in question were incomplete and inaccurate, and as a consequence liable to mislead. The main error, as will be apparent, is the failure to distinguish clearly between compelling a person not a party to an action to give pre-trial discovery on the one hand, and compelling him to give oral evidence and produce documents at the trial itself on the other hand. I think that it is right for your Lordships to say that the criticisms of that error made by the two courts below were fully justified and that it is most unfortunate that it should ever have occurred. That said, however, having regard to the admission of such error freely made by Mr. Alexander for the re-re-insurers, and having regard further to the summary which I endeavoured to give earlier of the relevant procedure of the High Court in England, it seems to me that the error is no longer of significance in the consideration of this appeal.

The second change of position concerns the scope of the re-re-insurers' application to the United States district court. As I indicated earlier, that application as originally framed covered two distinct matters: first, the production and inspection of specified classes of documents; and, secondly, the appearance of three named persons from P.G.A. and Campbell-Husted to give testimony by depositions. On the face of the motion it appeared that what the re-re-insurers were seeking in relation to the second of these matters was the taking of oral evidence from the persons named relevant to the issues in the English actions, such evidence to be recorded in depositions. Before the Court of Appeal, however, Mr. Sumption for the re-re-insurers expressly abandoned any intention to achieve this end, and before your Lordships Mr. Alexander made it clear that the appearance of the named persons was only sought for the purpose of their producing and identifying the relevant documents held by P.G.A. and Campbell-Husted, and in no way for the purpose of their giving oral evidence to be recorded in depositions with regard to issues of fact arising in the English actions.

The third change of position arises from the stage which the two actions in England have now reached. At the time when South Carolina's applications first came before Hobhouse J. the re-re-insurers had not yet served their points of defence and counterclaim, so that the issues between the parties had not yet been defined by pleadings and no

A discovery of documents as between the parties had yet taken place. Hobhouse J. regarded this as a significant matter in exercising the discretion to grant injunctions which he held that he had. During the hearing before the Court of Appeal, however, the re-re-insurers served points of defence and counterclaim, and since then discovery of documents as between the parties has taken place. The actions in England are, therefore, much further advanced than they were when B South Carolina's applications first came before the judge.

The fourth change of position is this. Following the decision of the Court of Appeal South Carolina arranged for the re-re-insurers to have controlled access to certain documents held by P.G.A. and Campbell-Husted. According to the re-re-insurers, however, substantial restrictions were imposed by South Carolina on the documents which they were C allowed to inspect under this arrangement. It is the re-re-insurers' case, therefore, that their application to the United States district court remains necessary in order to enable them to have inspection of other documents to which, by reason of the control exercised by South Carolina, they have not so far had access. Your Lordships were not asked to go into the details of these matters, which are in dispute between the parties, and it is right, I think, for the purposes of this D appeal for your Lordships to proceed on the basis that the re-re-insurers have at least an arguable case with regard to them.

The fifth and final matter to which attention should be drawn is that the judge of the United States district court before whom the re-re-insurers' application under section 1782 is pending has helpfully directed that further proceedings in that application should be stayed until the E determination first of the re-re-insurers' appeal to the Court of Appeal, and then of their further appeal to your Lordships' House.

My Lords, having drawn attention to these various preliminary matters, I turn to consider whether the injunctions granted by Hobhouse J. and affirmed by the Court of Appeal should be allowed to stand. I put the question in that form because of the various ways described by me above in which the positions of the parties have F changed since the original hearing before Hobhouse J.

As appears from the passages from the judgments of Hobhouse J. and Griffiths L.J. which I set out earlier, both courts below treated South Carolina's applications for injunctions as raising matters of principle for decision. I have no doubt that they were right so to treat them. Putting the point differently, the question which your Lordships G have to decide is whether the circumstances of the case are such as to give the court power to grant the injunctions at all, and not whether, there being such power, it was a proper exercise of discretion to grant them rather than to refuse them.

In considering the question which I have formulated, it will be helpful in the first place to state certain basic principles governing the grant of injunctions by the High Court. The first basic principle is that H the power of the High Court to grant injunctions is a statutory power conferred on it by section 37(1) of the Supreme Court Act 1981, which provides that "the High Court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the court to

be just and convenient to do so." That provision is similar to earlier provisions of which it is the successor, namely, section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 and section 25(8) of the Supreme Court of Judicature Act 1873. The second basic principle is that, although the terms of section 37(1) of the Act of 1981 and its predecessors are very wide, the power conferred by them has been circumscribed by judicial authority dating back many years. The nature of the limitations to which the power is subject has been considered in a number of recent cases in your Lordships' House: *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210; *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557; and *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58. The effect of these authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable. The third basic principle is that, among the forms of injunction which the High Court has power to grant, is an injunction granted to one party to an action to restrain the other party to it from beginning, or if he has begun from continuing, proceedings against the former in a foreign court. Such jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign court concerned.

The latter form of injunction may be granted in such circumstances as to constitute an exception to the second basic principle stated above. This may occur where one party has brought proceedings against another party in a foreign court which is not the forum conveniens for the trial of the dispute between them, as that expression was defined and applied in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795. In such a case the party who has brought the proceedings in the foreign court may not, by doing so, have invaded any legal or equitable right of the other party, nor acted in an unconscionable manner. The court nevertheless has power to restrain him from continuing his foreign proceedings on the ground that there is another forum in which it is more appropriate, in the interests of justice, that the dispute between the parties should be tried. The present case, however, is not concerned with a choice between two competing forums for the trial of a dispute, and the exception to which I have just referred is therefore not relevant to it.

The power of the court to grant *Mareva* injunctions may also, before it was statutorily recognised, have been a further exception to the second basic principle stated above. That power, however, has now been expressly recognised by section 37(3) of the Supreme Court Act 1981, and again the present case is in no way concerned with it.

Ignoring these exceptions, therefore, and applying the basic principles which I have stated to the present case, the first question for consideration is whether South Carolina has shown that what I have

described above as situation (1) exists. Has South Carolina shown that the re-re-insurers, by beginning and intending to prosecute their application to the United States district court, has invaded, or threatened to invade, a legal or equitable right of South Carolina for the enforcement of which the re-re-insurers are amenable to the jurisdiction of the court? It was contended by Mr. Rokison on behalf of South Carolina that South Carolina did indeed have such a legal or equitable right, but it appeared to me that he had great difficulty in formulating the legal or equitable right on which he relied. Neither of the courts below decided as they did on the basis that the re-re-insurers had by their conduct invaded a legal or equitable right of South Carolina, and I cannot see how such a case can be made out. I would therefore hold that South Carolina has not shown that situation (1) exists.

The second question for consideration is whether South Carolina has shown that what I have described above as situation (2) exists. Has South Carolina shown that the re-re-insurers, by beginning and intending to prosecute their application to the United States district court, have acted in a manner which is unconscionable? It is difficult, and would probably be unwise, to seek to define the expression "unconscionable conduct" in anything like an exhaustive manner. In my opinion, however, it includes, at any rate, conduct which is oppressive or vexatious or which interferes with the due process of the court.

Although neither Hobhouse J. at first instance, nor Griffiths L.J. in the Court of Appeal, stated in terms that they thought it right to grant injunctions on the ground that the conduct of the re-re-insurers in making their application to the United States district court was unconscionable, it seems to me to be implicit in their reasons that they regarded it as being so. Hobhouse J. based his decision expressly on the need for the court to retain control of its own process, with the necessary implication that the re-re-insurers' conduct was an interference with such control and therefore an interference with the due process of the court. Griffiths L.J. based his decision on three grounds: first (like Hobhouse J.), that the court must retain control of its own process; secondly, that the civil procedure of United States courts is significantly different from that of English courts, and the parties, by submitting to the jurisdiction of an English court, must be taken to have accepted its procedure; and, thirdly, that unrestricted access to foreign procedural remedies was liable to produce hardship in the form of increased costs and inconvenience. I shall consider each of these grounds in turn.

I consider, first, the ground that the re-re-insurers' conduct was an interference with the court's control of its own process. It is not clear to me why this should be so. Under the civil procedure of the High Court the court does not, in general, exercise any control over the manner in which a party obtains the evidence which he needs to support his case. The court may give him help, certainly; for instance by discovery of documents inter partes under R.S.C., Ord. 24; by allowing evidence to be obtained or presented at the trial in various ways under Orders 38 and 39; and by the issue of subpoenas under Part II of Order 38, to which I referred earlier. Subject, however, to the help of the court in these various ways, the basic principle underlying the preparation and

presentation of a party's case in the High Court in England is that it is for that party to obtain and present the evidence which he needs by his own means, provided always that such means are lawful in the country in which they are used. It was not in dispute that, if P.G.A. and Campbell-Husted, uninfluenced by the control exercised over them by South Carolina on the advice of the latter's English solicitors, had freely and voluntarily allowed the re-re-insurers to inspect, and where necessary to copy, all the documents referred to in the latter's application, it could not possibly have been said that there had been any interference with the English court's control of its own process. That being so, I cannot see why, since the Federal law of the United States authorises an application of the kind made by the re-re-insurers in this case, the making of such application, which may or may not succeed in whole or in part, should be regarded as being such an interference either. I cannot, therefore, agree with the first ground of decision relied on by the Court of Appeal.

I consider, secondly, the ground that the procedure of United States courts is significantly different from that of English courts, and the parties, by submitting to the jurisdiction of an English court, must be taken to have accepted its procedure. It is, no doubt, true that the re-re-insurers, by entering unconditional appearances in the two English actions, can be said in a certain sense to have accepted the procedure of that court. Your Lordships were not, however, informed of any ground on which the re-re-insurers could, with any prospect of success, have contested the jurisdiction of the High Court in England in respect of the disputes which are the subject matter of the two actions concerned. Be that as it may, I cannot see that the re-re-insurers, by seeking to exercise a right potentially available to them under the Federal law of the United States, have in any way departed from, or interfered with, the procedure of the English court. All they have done is what any party preparing his case in the High Court here is entitled to do, namely to try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case. It was said that the re-re-insurers could have applied to the High Court under R.S.C., Ord. 39, r. 2, for letters of request to issue to the proper judicial authorities in the United States. But 28 United States Code, section 1782, allows an application to be made either indirectly by the foreign court concerned or directly by an interested party, and I can see no good reason why the re-re-insurers should not have chosen whichever of these two alternatives they preferred. It is, I think, of the utmost importance to appreciate that the reason why English procedure does not permit pre-trial discovery of documents against persons who are not parties to an action is for the protection of those third parties, and not for the protection of either of the persons who are parties to the action. I cannot, therefore, agree with the second ground of decision relied on by the Court of Appeal.

I consider, thirdly, the ground that unrestrained access to foreign procedural remedies was liable to cause hardship in the form of increased costs and inconvenience. So far as increased costs are concerned, Griffiths L.J. was referring to increased costs incurred or to be incurred

by South Carolina in contesting the proceedings in the United States district court. If, however, the re-re-insurers are right in their contention that they have not yet, by reason of the control exercised by South Carolina, had access to all the documents to which they believe that they need access in order to prepare their case in the two English actions, it can reasonably be said that any liability for increased costs incurred by South Carolina is in a sense self-imposed. If they had been willing to permit P.G.A. and Campbell-Husted to allow the re-re-insurers to inspect, and where necessary copy, all the documents to which the latter had sought access, the making or prosecution of the re-re-insurers' application to the United States district court would not have been necessary. In this connection it is right to stress what I have already stated earlier, that P.G.A. and Campbell-Husted, left to themselves, would voluntarily have given the re-re-insurers permission to inspect, and where necessary copy, all the documents to which the latter sought access. It was said for South Carolina that the documents not so far disclosed were not relevant to the issues in the two English actions. If that is so, I cannot help asking myself why South Carolina has gone to such lengths to prevent the disclosure of such documents. So far as inconvenience is concerned, it is apparent that Griffiths L.J. had two kinds of inconvenience in mind: first inconvenience in relation to the two actions immediately concerned in the form of delay in getting them tried and possible prolongation of the trial when it took place; and, secondly, inconvenience to other litigants by reason of the consequent dislocation of the time-table for the trial of other cases in the congested list of the Commercial Court. So far as delay is concerned, it is perhaps ironical that the only result of South Carolina seeking to obtain injunctions against the re-re-insurers has been to increase greatly whatever delay the re-re-insurers' application, if allowed to proceed unopposed, might otherwise have caused. I recognise that the re-re-insurers' application may result in some increased costs to South Carolina, but these could, as I indicated earlier, have easily been avoided by a different attitude on South Carolina's part. I recognise also that some inconvenience of the two kinds to which I have referred may arise from the re-re-insurers' application; but, if there is a reasonable possibility that such inconvenience is the price of justice being fully done at the trial of the two English actions, then it seems to me to be a price which must necessarily be paid. In any event, I cannot see how the re-re-insurers' application, made in what may prove to be a just cause, can, solely on the ground that it occasions the extra costs and inconvenience under discussion, be categorised as an interference with the court's control of its own process. The court can control any excessive delay by fixing such date for the trial of the two actions as may be just, and nothing which the re-re-insurers can do can take away or interfere with the court's control in this respect. As to increased costs these will, no doubt, be a matter for the consideration of the Commercial judge at the conclusion of the trial, and I do not think it would be right for your Lordships to express any views, one way or the other, about such matter. For these reasons I cannot agree with the third ground of decision relied on by the Court of Appeal.

My Lords, the result of the views which I have expressed is that there was, in my opinion, no such interference with the procedure of the English High Court by the re-re-insurers as would amount to unconscionable conduct on their part, and so justify, in accordance with the basic principles which I stated earlier, the exercise of the court's power to grant injunctions against them. It follows that I would allow the appeal and set aside the orders of Hobhouse J. dated 25 April 1985 and of the Court of Appeal dated 23 May 1985. As regards costs in your Lordships' House, I have no doubt that South Carolina should pay the costs of the re-re-insurers. As regards costs in the two courts below, different considerations may apply, first, because of the breadth of the re-re-insurers' application to the United States district court as originally framed, and, secondly, because of the misleading nature, in the respect to which I referred earlier, of the memorandum and affidavit lodged in support of such application. I therefore think it desirable that, in relation to those costs, your Lordships should have the assistance of further argument from counsel on either side.

Lord Brightman. My Lords, in this appeal I respectfully differ from the conclusion reached by the Court of Appeal. I have had the privilege of studying in advance the speech of my noble and learned friend, Lord Brandon of Oakbrook, and I find myself wholly convinced by his reasons for moving that this appeal should be allowed. I agree with the orders that he proposes should be made.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Brandon of Oakbrook and Lord Goff of Chieveley. I agree that it would be wise to make the reservation on the matter to which Lord Goff of Chieveley has drawn attention but, like him, I agree with the conclusion reached by Lord Brandon of Oakbrook and with the reasons he has given for reaching that conclusion.

Lord Goff of Chieveley. My Lords, I find myself to be in respectful agreement with the conclusion reached by my noble and learned friend, Lord Brandon of Oakbrook, on this appeal, and with the reasons given by him for reaching that conclusion. I wish, however, to draw attention to one matter upon which I have certain reservations, and to which I attach importance.

I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available. In particular, I do not regard the exercise of the power to restrain a person from commencing or continuing proceedings in a foreign forum as constituting an exception to certain limited categories of case in which it has been said that the power may alone be exercised. In my opinion, restraint of proceedings in a foreign forum simply provides one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised. I have

elsewhere explained in detail, for reasons which it is unnecessary for me to repeat in the present case, why, on the basis of a line of established authority, I am at present inclined to the opinion that an injunction has generally been granted in such circumstances for the purpose of protecting the English jurisdiction, and why I doubt, with all respect, whether the speech of my noble and learned friend, Lord Scarman, in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, contains the last word on the subject. I refer, in this connection, to my judgment in *Bank of Tokyo Ltd. v. Karoon* (Note) [1987] A.C. 45.

Even so, I can see no basis for the grant of an injunction in the present case. In particular, in agreement with my noble and learned friend Lord Brandon of Oakbrook, and respectfully differing from Hobhouse J. and the Court of Appeal, I do not consider that the grant of the injunction can be justified as necessary to protect the English jurisdiction on the facts of the present case. In this, I find myself entirely in agreement with the reasons expressed in the speech of my noble and learned friend, Lord Brandon of Oakbrook. I therefore agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: Clyde & Co.; Herbert Smith & Co.

J. A. G.

NOTE

[COURT OF APPEAL]

BANK OF TOKYO LTD. v. KAROON AND ANOTHER

1984 April 3, 4, 5; May 24

Ackner and Robert Goff L.JJ.

Injunction—Jurisdiction to grant—Foreign proceedings—Interpleader proceedings to determine ownership of money held by bank in England—Bank's subsidiary in New York providing information concerning claimant and his accounts—Claimant bringing proceedings in New York against subsidiary—Whether bank entitled to injunction to restrain proceedings in New York

APPEAL from Bingham J.

In 1983 Mr. Majid Karoon started proceedings in New York against the Bank of Tokyo Ltd., a Japanese bank carrying on business in London, and also against a wholly-owned subsidiary of that bank, the Bank of Tokyo Trust Co.

(B.T.T.C.). The bank applied to the High Court in London for an order preventing Mr. Karoon from continuing that action. On 7 November 1983 Bingham J. refused to order Mr. Karoon to discontinue his action against B.T.T.C. but did order that he be restrained from continuing against the bank.

The bank appealed against that part of the order relating to B.T.T.C. The grounds of their appeal, contained in a notice dated 18 November 1983, were that (1)(i), in relation to Mr. Karoon's claim against B.T.T.C., the judge had failed to give sufficient consideration to the facts that (a) the New York action involved litigation of the matter already ordered to be determined in the trial of an interpleader issue brought by the bank in the High Court regarding the true ownership of the relevant moneys, (b) the continuation of the New York action against B.T.T.C. would mean that the bank, contrary to their position as interpleaders, would acquire an interest in the outcome of the interpleader issue ordered between Mr. Karoon and his Iranian company, Maritime Co. Ltd., (c) Mr. Karoon had made no complaint about the use or proposed use by the bank of the information contained in their affidavit dated 20 May 1980 at any time before the interpleader issue had, with his consent, been ordered, and (d) there was no apparent difference between the laws of New York and England relating to bank confidentiality; (ii) the judge failed to give sufficient weight to the difficulty, inconvenience, undesirability and inappropriateness of entrusting to a foreign court (with or without a jury) rather than to the English court the investigation and determination of, inter alia, (a) whether the order of Robert Goff J. dismissing Mr. Karoon's application made in the course of the interpleader proceedings that no disclosure of the existence of certain sums of money be made, had been caused by the information set out in that affidavit and whether he would have reached a different conclusion if such evidence had not been submitted by the bank, (b) whether, if the interpleader summons had been struck out as regards the relevant sums of money, the bank would have refused payment and defended any claim brought against them by Mr. Karoon for such sums and, if so, what the consequences of such a course of action would have been, (c) other incidental questions of the practice and procedure of the High Court; (iii) the judge should have held that Mr. Karoon's contention that the decision of Robert Goff J. was caused by the information in the affidavit of 20 May 1980 was arguable; (iv) the judge failed to give sufficient consideration or weight to the nature and amount of the damages which might be recoverable by Mr. Karoon if any cause of action against B.T.T.C. was established. (2) The judge should have held that the prosecution of the New York action should be restrained in its entirety because (i) it involved relitigating matters already determined or in issue in the English proceedings, namely the propriety of the interpleader summons as regards the relevant moneys, and (ii) it represented a sanction on the use by the bank of admissible and pertinent evidence in the English proceedings. (3) The judge should have held that the injustice to the bank in being sued by Mr. Karoon through the medium of the bank's wholly-owned subsidiary and/or that it was unrealistic to distinguish between the bank and B.T.T.C in this regard.

The facts are set out in the judgments of Ackner and Robert Goff L.JJ.

The following cases are referred to in the judgments:

Abidin Daver, The [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470, H.L.(E.)

Armstrong v. Armstrong [1892] P. 98

Atlantic Star, The [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.)

Bethell v. Peace (1971) 441 F. 2d 495

Booth v. Leycester (1837) 1 Keen 579
British Airways Board v. Laker Airways Ltd. [1984] Q.B. 142; [1983] 3 W.L.R. 544; [1983] 3 All E.R. 375, C.A.
Bushby v. Munday (1821) 5 Madd. 297
Carron Iron Co. v. Maclaren (1855) 5 H.L.Cas. 416, H.L.(E.)
Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.)
Chapman v. Honig [1963] 2 Q.B. 502; [1963] 3 W.L.R. 19; [1963] 2 All E.R. 513, C.A.
Christian v. Christian (1897) 67 L.J.P. 18
Cohen v. Rothfield [1919] 1 K.B. 410, C.A.
Cole v. Cunningham (1890) 133 U.S. 107
Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458; [1971] 2 W.L.R. 441; [1971] 1 All E.R. 694, P.C.
Distin, In re (1871) 24 L.T. 197
Ellerman Lines Ltd. v. Read [1928] 2 K.B. 144, C.A.
Enoch and Zaretzky Bock & Co.'s Arbitration, In re [1910] 1 K.B. 327, C.A.
European Asian Bank A.G. v. Punjab & Sind Bank [1982] 2 Lloyd's Rep. 356, C.A.
Fallon v. Calvert [1960] 2 Q.B. 201; [1960] 2 W.L.R. 346; [1960] 1 All E.R. 281, C.A.
Graham v. Maxwell (1849) 1 Mac. & G. 71
Gulf Oil Corporation v. Gilbert (1947) 330 U.S. 501
Hyman v. Helm (1883) 24 Ch.D. 531, C.A.
Laker Airways Ltd. v. Sabena, Belgian World Airlines (1984) 731 F. 2d 909
Lett v. Lett [1906] 1 I.R. 618
McHenry v. Lewis (1882) 22 Ch.D. 397, C.A.
MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.)
Moore v. Moore (1896) 12 T.L.R. 221, C.A.
North Carolina Estate Co. Ltd., In re (1889) 5 T.L.R. 328
Peruvian Guano Co. v. Bockwoldt (1883) 23 Ch.D. 225, C.A.
Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235
St. Pierre v. South American Stores (Gath & Chaves) Ltd. [1936] 1 K.B. 382, C.A.
Sim v. Robinow (1892) 19 R. 665
Smith Kline & French Laboratories Ltd. v. Bloch [1983] 1 W.L.R. 730; [1983] 2 All E.R. 72, C.A.
Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français", 1926 S.C.(H.L.) 13, H.L.(Sc.)
Tournier v. National Provincial and Union Bank of England [1924] 1 K.B. 461, C.A.
Trapp v. Mackie [1979] 1 W.L.R. 377; [1979] 1 All E.R. 489, H.L.(Sc.)
Trendtex Trading Corporation v. Credit Suisse [1980] Q.B. 629; [1980] 3 W.L.R. 367; [1980] 3 All E.R. 721, C.A.; [1982] A.C. 679; [1981] 3 W.L.R. 766; [1981] 3 All E.R. 520, H.L.(E.)
Tropaioforos, The (No. 2) [1962] 1 Lloyd's Rep. 410

The following additional cases were cited in argument:

Cook v. Swinfen [1967] 1 W.L.R. 457; [1967] 1 All E.R. 299, C.A.
Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] I.C.R. 114; [1982] 1 All E.R. 1042, H.L.(E.)

Metall und Rohstoff A.G. v. A C L I Metals (London) Ltd. [1984] 1 Lloyd's Rep. 598, C.A.
Portarlington v. Soulby (1834) 3 My. & K. 104
X A.G. v. A Bank [1983] 2 All E.R. 464; [1983] 2 Lloyd's Rep. 535

Leonard Hoffmann Q.C. and *D. T. Donaldson* for the Bank.
N. A. Strauss for Mr. Karoon.

Cur. adv. vult.

24 May 1984. The following judgments were read.

Ackner L.J. The respondent, Mr. Karoon, is neither a national of, nor resident in, this country. He is an Iranian citizen who left Iran at the time of the revolution in November 1979 and is now living in France. The Bank of Tokyo Trust Co. ("B.T.T.C") is a New York corporation which is a wholly owned subsidiary of the Bank of Tokyo Ltd. ("B.T."), the appellants, a Japanese bank carrying on business in London.

On 7 November 1983 Bingham J. refused to grant an injunction restraining Mr. Karoon from taking any further steps in an action that he had begun in New York against B.T.T.C., or commencing or prosecuting any other proceedings relating to the same subject matter before any other court than the English High Court. It is against this refusal that B.T. now appeals. He did however order that Mr. Karoon be restrained from continuing the proceedings against B.T., who had been joined as co-defendants with B.T.T.C. Against this decision there is no cross-appeal.

The circumstances out of which his claim in the New York action arose can be shortly stated. Although Mr. Karoon and his wife and children were able to leave Iran, the rest of Mr. Karoon's family and his wife's family are still in Iran and he has fears for their safety. From 1961 onwards he was the chief operating officer of an Iranian company called Maritime Co. Ltd. ("Maritime") in which he owned nearly all the shares. Maritime carried on a shipping business. For some years prior to his departure from Iran he maintained a personal bank account with B.T.T.C. He also maintained both a personal and a company account with B.T. Following his departure from Iran, Mr. Karoon transferred approximately $685,000 from his personal account with B.T.T.C. to his personal account with B.T. He also instructed B.T. to transfer all money from the company account to his personal account.

In February 1980 B.T. received a letter from Maritime in Iran to advise them that on 3 February 1980 Mr. Karoon had been sentenced in absentia to 10 years' imprisonment and that his property and the company's had been taken over by the Government of Iran. B.T. was asked to transfer all balances to Iran. B.T. responded to the effect that all the company's accounts had been closed prior to their receipt of this letter, upon the instructions of the accounts sole signatory (Mr. Karoon), and that under English law it would be a breach of confidence to make any disclosure regarding a customer's personal affairs without his prior authorisation. They also advised Mr. Karoon of their receipt of this letter and their response. He thereupon instructed them to transfer funds they were holding to an account which he maintained with another bank. B.T. was concerned with its position. If it did not carry out his instructions, it might be liable to him. On the other hand, if it did carry out his instructions, it might be liable to those now in charge of Maritime. Accordingly, on 21 March 1980, B.T. issued an interpleader summons to determine whether the money which it held was payable to Mr. Karoon or to Maritime.

On 15 April 1980 Mr. Karoon issued a summons to strike out the interpleader proceedings under R.S.C., Ord. 18, r. 19. In his affidavit he swore, inter alia:

> "On 3 December 1979 I remitted U.S. $685,800 of my own money from my account at the bank's branch in New York to the bank . . . These moneys had not originated from the company."

He explained how they were placed on deposit and that on 27 December 1979 there was due to him U.S. $689,421·88. He contended that Maritime could have no arguable claim to these moneys, even if proceedings were appropriate in respect of the English funds. He also expressed concern that, if the Iran Government knew about the funds in London, his relations would be used as a lever to force him to remit the money to Iran.

In reply to this affidavit, Mr. Saunders, an officer of B.T., swore another affidavit in which he said, in paragraphs 1 to 4 as follows:

> "1. Inquiries have been made of the Bank of Tokyo Trust Co., New York in respect of a remittance in the sum of U.S. $685,800 credited to the first defendant's external savings account number 61817–3 on 5 December 1979 in order to establish the source of the said money.
>
> "2. I am informed and verily believe that the said sum was made up from two fixed deposits ((a) and (b) respectively) which were automatically renewable every three months and which had been pre-matured and credited to the first defendant's New York checking account (number 121–004–775) in order to cover the said payment. Fixed deposit (a) was valued at U.S. $183,797·83 and (b) at U.S. $497,803·98.
>
> "3. Fixed deposit (a) was opened on 14 December 1978 with a transfer of U.S. $170,000 from a savings account maintained by the first defendant, which account was opened on 5 April 1976 with initial funds of U.S. $425,000 by means of a transfer from the first defendant's checking account number 121–004–775. I am informed that the sum of U.S. $511,000 had been credited to the said checking account on 30 December 1975 by order of Fairfield International Ltd. of 227 Park Avenue, New York. Prior to 14 December 1978, the said savings account had been credited with U.S. $115,200, being the proceeds of a cheque drawn on Midland Marine Bank, New York by order of Mowbrays Tug and Barge Sales Corporation.
>
> "4. Fixed deposit (b) was opened on 23 April 1979 with a transfer of U.S. $473,000 from the said savings account maintained by the first defendant. The account had been credited on 11 April with the proceeds of a cheque for U.S. $32,569·75 drawn on Wells Fargo Bank New York by order of Utah House Fire Insurance Co. and on 23 April with the proceeds of a cheque for U.S. $441,992·01 drawn on Chase Manhattan Bank by order of Adams and Porter Inc."

The affidavit was never served on Maritime, who were at that time not party to the proceedings to strike out. The application, which was heard by Robert Goff J. failed. A note of his judgment was before Bingham J., and the relevant part of the proceedings before him was quoted by the judge:

> "There were certain accounts in the name of Majid Karoon and certain accounts in the name of Maritime. Certain moneys were transferred from New York which Majid Karoon says are his. There has been an amalgamation of accounts carried out in accordance with instructions given on 24 December 1979 and 20 February 1980. . . . Finally I am asked to look at the evidence to find that a substantial part of the moneys must belong to Majid Karoon. I am invited to look at the letter and to find that it makes no claim on Majid Karoon's assets. The difficulty is that I am faced with one party's evidence. The bank is in the middle and can only act fairly,

which it cannot do not knowing the full facts. It would be quite wrong for me to pre-empt the situation on one party's evidence—especially having regard to the history which shows that Majid Karoon has not sought to keep his own and Maritime's moneys separate. No accurate assumptions on a split can be made.

"It seems to me that the workers council letter is written in such English as the bank has reasonable grounds to assume that a claim may be pressed not only against Maritime's accounts but also against Majid Karoon's accounts in so far as the money is in origin Maritime's money which he has transferred into his own account. He may have acted in breach of his obligations to the company. In my judgment there are reasonable grounds that the bank may be sued for not only Maritime's money but also that money held by Majid Karoon. The bank was fully entitled to interplead. I cannot accede to the application. To interplead was a natural reflex of the bank."

On 4 March 1983 an interpleader issue was eventually ordered. The order was by consent, no attempt being made to limit the order to the English as opposed to the American moneys. It read as follows:

"1. The plaintiffs [B.T.] be forthwith discharged from any liability to either of the defendants in respect of any moneys the subject matter of these proceedings and that no action be brought in respect thereof against the plaintiffs by either of the defendants, including an action by the first defendants acting in the name of the second defendants.

"2. The plaintiffs do pay the moneys the subject matter of these proceedings after deduction of their usual banking charges into court as and when each of the current special deposits matures and that the moneys presently held on call be paid together with the first special deposit money on maturity thereof and that meanwhile the plaintiffs hold the said moneys to the direction of the court."

The complaint of the New York proceedings is based upon B.T.T.C.'s voluntary disclosure to B.T. of information relating to his account in New York. This disclosure is alleged to have been a breach of its contractual duty of confidence to Mr. Karoon, to have violated Mr. Karoon's "right of privacy", and made in conspiracy with B.T. to injure Mr. Karoon. A total of U.S. $4,000,000·00 damages is claimed, U.S. $1,000,000·00 as punitive damages for the breach of the "right of privacy" and the conspiracy, additional to the U.S. $1,000,000·00 claimed for "special damage" for each of the three causes of action.

Before Bingham J., Mr. Hoffmann submitted that the New York proceedings would cause injustice to his clients for a number of reasons, which the judge summarised under five headings. The first two can be taken together, it being submitted: whatever the prospects of success, the New York action is an attempt to penalise B.T. for availing itself of the interpleader procedure in England and complying with the Rules of the Supreme Court. The New York action would involve relitigating a matter already litigated in England, i.e. whether an interpleader should have been ordered in respect of moneys remitted from the United States. As such, the action is vexatious and oppressive. It is in truth doubly vexatious and oppressive because it has no reasonable prospect of success, since Mr. Karoon will be quite unable to show that he has suffered any damage, because Robert Goff J. would have made the self same order if B.T. had not relied upon the information provided to it by B.T.T.C.

Mr. Hoffmann's three further points submitted to the judge can be stated as one proposition, namely, that an English court is the forum conveniens because it can without difficulty resolve what duty of confidence, if any, was owed by the

New York bank in these circumstances to its client Mr. Karoon. *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461, is the source of the law in both jurisdictions. By contrast, a New York judge would be faced with difficult questions concerning the duty of an English litigant in an English interpleader. Moreover, if Mr. Karoon were able to establish that he would have succeeded in striking out the interpleader proceedings had not B.T.T.C. provided the information to B.T., he would still have to establish, in order to claim damages, that the money in London belonged to him and that issue has to be decided in London. Mr. Karoon, moreover, has no legitimate judicial advantages in proceeding in New York.

Before Bingham J. no submission appears to have been made to the judge that a different approach might be justified to the New York action, according to whether one was considering the position of B.T.T.C. or the position of B.T. Neither party asked the judge to differentiate between B.T. and B.T.T.C. in any order he made. However, in his judgment, viewing the two companies as two separate legal entities, Bingham J. concluded that they should be treated separately. In regard to the New York action, in so far as it related to B.T.T.C., he said:

> "It is an action brought in New York against a bank incorporated and carrying on business there. Mr. Karoon, an Iranian citizen resident in France, had an account with that bank. Although Mr. Karoon has advanced three causes of action against B.T.T.C. (breach of confidence, invasion of privacy and conspiracy) it seems plain that his central complaint against B.T.T.C. arises from its voluntary dislosure to B.T. of information relating to his account. Whether this disclosure involved a breach of contractual duty, or of Mr. Karoon's right to privacy, on the part of B.T.T.C. must be determined according to the law of New York. Whether B.T.T.C. was guilty of an actionable conspiracy may also fall to be decided under that law, although this cause of action appears to be something of a makeweight. The disclosure by B.T. to the English court forms no part of Mr. Karoon's cause of action against B.T.T.C. That disclosure does have a significant bearing on Mr. Karoon's ability to prove actual damage flowing from the disclosure, since he could show none if Robert Goff J. would have made the same order even without the information concerning Mr. Karoon's American transactions in Mr. Saunders' affidavit. To that extent the action does involve inquiry into what Robert Goff J. would have done on different evidence, an inquiry which would be best carried out by this court. It is, however, an inquiry which a New York court could doubtless undertake and resolve. Mr. Karoon may have a cause of action for invasion of privacy available to him in New York which is not available here. It would certainly appear that his chances of obtaining substantial damages on a punitive or exemplary basis are better there. His ability to sue in New York on a contingency fee basis may not be a juridical advantage (*Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730, 747H) and is, in my view counterbalanced by B.T.T.C.'s inability to recover costs if successful, but is certainly not an argument against allowing the New York action to proceed against B.T.T.C. Overall, I do not regard an injunction as appropriate to restrain the action insofar as it lies against B.T.T.C. If the action were to proceed, B.T.T.C. might, of course, win or lose; and if it lost the damages might be large, or nominal, or even non-existent. But all these seem to me to be matters best entertained and resolved in the New York court which would be applying its own law to events very largely occurring within its own jurisdiction."

In reaching his decision relative to B.T.T.C., Bingham J. was applying the principles to which he made specific reference, as laid down or reflected in the decisions of *The Atlantic Star* [1974] A.C. 436, *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 and *Trendtex Trading Corporation v. Credit Suisse* [1980] Q.B. 629. These principles were not in dispute between the parties.

He then turned to the New York action against B.T., commenting that the claim assumed a somewhat different aspect. He said:

> "The crux of Mr. Karoon's complaint against B.T. is that it acted unlawfully in seeking information from B.T.T.C. The allegation is made that B.T. gratuitously revealed this information, but Mr. Strauss accepted that the revelation was not gratuitous and acknowledged the difficulty of maintaining that B.T. had no interest in revealing that information. B.T. is also accused of conspiracy and inducement of breach of contract by B.T.T.C. but these complaints arise out of the same factual premise, namely, the request for information made by B.T. to B.T.T.C. This was a request made by B.T. in the context of its role as a party seeking to interplead under R.S.C., Ord. 17. In his original affidavit, Mr. Saunders had made no overt reference to these moneys transferred by B.T.T.C. to B.T. Mr. Karoon raised a clear issue concerning them in his affidavit of 25 April. B.T. had either to let the matter (and the moneys) go, with the risk that it might later be held accountable for the moneys, or make such inquiries as it could (or, if it had already made inquiry, inform the court of the result).
>
> "Leaving entirely on one side the question whether, on information being requested, B.T.T.C. should, as a matter of New York law, have complied with the request, I think that two significant questions of English law arise in respect of B.T.'s conduct: whether it was reasonable and proper for B.T., in seeking to protect its own interests, to request information from B.T.T.C.; and whether, in pursuance of its duty as a party applying to interplead it was proper for B.T. to seek to lay before the court all evidence within its power relevant to the application. This is a lis between a bank carrying on business in London and a London customer of that bank arising out of English interpleader proceedings to which both were party. Moreover, it directly touches on a matter with which this court must be very closely concerned, the proper conduct of a party to English interpleader proceedings. I should not and do not form or express any opinion whether B.T.'s conduct was proper or improper. That is not an issue before me. I am, however, of the opinion that B.T. would be exposed to the risk of real injustice if the propriety of its conduct were to be judged in any court other than that in which the interpleader proceedings took place. It furthermore appears to me that England is in every way a more appropriate forum than New York for trial of the issues between Mr. Karoon and B.T. and that Mr. Karoon would lose no legitimate juridical or personal advantage by suing here. The New York forum would afford him no additional cause of action and the chance of an improved measure of damage would be problematical. These considerations are, however, in my judgment, of less weight in this than the usual case because the overriding consideration of what justice demands points strongly towards restraint of Mr. Karoon's action against B.T. in New York. If B.T. were the only New York defendant, I would, even bearing in mind the need for great caution in restraining prosecution of a foreign action, think it right to grant an injunction."

The difficulty which then faced Bingham J. was the combination in one set of New York proceedings of claims against B.T.T.C., which he was not willing to

restrain, and claims against B.T., which he was. He concluded that it would not be right to grant an excessive injunction, which would be the case if he restrained the prosecution of an action which he regarded as properly brought against B.T.T.C. in New York, nor would it be right to expose B.T. to an unacceptable risk of injustice. He therefore made no mandatory order that Mr. Karoon discontinue his New York proceedings, but he continued the negative injunction made ex parte on 13 September 1983, restraining Mr. Karoon from taking any further steps in the New York action so far as it related to B.T. Mr. Karoon thus remained free to prosecute the New York action against B.T.T.C. Mr. Strauss on behalf of Mr. Karoon is content with that position because B.T. is not a necessary party to the New York action. Mr. Karoon can obtain all the remedies to which he is entitled with the New York action limited to B.T.T.C.

Before us Mr. Hoffmann has stressed the distinction between his two lines of argument, and reinforced the distinction by reference to the recent decision of the United States Court of Appeal for the District of Columbia Circuit, in *Laker Airways Ltd. v. Sabena, Belgian World Airlines* (1984) 731 F. 2d 909. His first line of argument is that, as a matter of English public policy, the claims in New York should not be allowed to be brought at all. Citing the American *Laker* case:

> "Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. . . . a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation" (*per* Judge Wilkey, at pp. 928–929),

he maintained: (1) that there is "an overriding public policy" that a litigant should be able to take all proper steps to put relevant evidence before the court; (2) that it is in the public interest that there should be finality in litigation, and since Mr. Karoon had not objected to Mr. Saunders' affidavit being put before Robert Goff J., he should not now be allowed to bring an action for damages allegedly arising from the use of that affidavit.

As regards the latter point, Mr. Hoffmann expressly accepted that any objection by Mr. Karoon would have been doomed to failure and in such circumstances it seems to me plain that Mr. Karoon cannot be blamed for having failed to take what is accepted would have been futile action.

Thus, Mr. Hoffmann's first and main criticism of Bingham J.'s decision is that he treated the case as being an ordinary case of competition between two jurisdictions where the question was which was the most appropriate forum.

It is however quite fundamental to Mr. Hoffmann's submission, (and he readily accepts this) that the public policy on which he relied requires the court to overlook the corporate distinctions in law between B.T. and B.T.T.C. While accepting that B.T. and B.T.T.C. are separate legal entities, Mr. Hoffmann contends that from a practical point of view it makes no difference whether B.T.T.C. was a branch of B.T. or a subsidiary. He argues that if one looks at the substance of the matter, B.T. are being sued in New York on account of the evidence which they gave in their own defence in proceedings brought against them by Mr. Karoon in London. The protection of B.T.'s own interests required the giving of this information and accordingly B.T., which must in practice be treated as having this information in their possession, was not in breach of its implied obligation of secrecy: see *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461.

The reality of the matter is that B.T.T.C. is not a branch of B.T. That is not the way in which B.T. has chosen to organise its business as a bank. Of course, B.T. is entitled to take all proper steps to obtain evidence to resist Mr. Karoon's application to strike out the interpleader summons, but the issue remains, were

these steps proper ones? If, as Mr. Karoon maintains, B.T.T.C. owed him a duty of confidence and was therefore not entitled to communicate to another separate legal entity any information concerning his account with them without his approval, then B.T.T.C. was in breach of its duty and it would follow that B.T. induced a breach of contract. Mr. Hoffmann accepted that if B.T.T.C. was not a subsidiary of B.T. but was another bank, then Mr. Karoon would certainly have a cause of action, although he maintained his contention that his damages would be purely nominal.

I can see no valid basis, and certainly no authority was provided to us by Mr. Hoffmann, for the contention that we must ignore the separate legal existence of B.T.T.C. Once the corporate distinction in law between B.T. and B.T.T.C. has to be recognised, the foundation of Mr. Hoffmann's submission that there is an English rule of public policy which requires that this action should not be allowed to be brought disappears. There is an arguable case that B.T.T.C., a separate juridical entity, owing Mr. Karoon an obligation of secrecy, broke that obligation when, without his consent, they revealed to B.T. the material referred to above concerning his account in New York.

In his reply, Mr. Hoffmann formulated a further issue of public policy, namely, that damages cannot be recovered, other than nominal damages for breach of contract, as a result of there being introduced into litigation in England relevant and admissible evidence, *even though such evidence has been improperly obtained.* He submitted that as a matter of public policy it is so essential to the administration of justice that all relevant and admissible evidence is placed before the courts that, even though such evidence may have been provided in breach of a contract not to divulge such material and damage can be established to have resulted from this wrongful disclosure, the plaintiff's remedy is limited to nominal damages for breach of contract, and he has no remedy against the person who wrongfully induced the breach of contract.

Mr. Hoffmann was at pains to make quite clear that he was not limiting this rule of public policy to the case of a plaintiff who had wrongfully concealed evidence or sought to mislead the court, and had ultimately failed in his claim because evidence improperly obtained had ultimately been put before the court. That would merely be an example of the well-established principle, ex turpi causa non oritur actio. Mr. Hoffmann was unable to produce any authority in support of the existence of this rule of public policy and it became apparent in the course of his submissions that it would not be difficult to imagine examples where such a rule would operate contrary to accepted notions of justice and fairness. Moreover, it is of the very essence of our adversarial system that the court decides the dispute on the material placed before the court, it being for the parties and not for the court to decide of what that material should consist. Hence the well-established principle that in civil litigation the judge is not entitled, without the consent of the parties, to call a witness, although he may have every reason to believe that such a witness might well enable him the better to reach a just decision: see *In re Enoch and Zaretzky Bock & Co.'s Arbitration* [1910] 1 K.B. 327 and *Fallon v. Calvert* [1960] 2 Q.B. 201.

I am therefore far from satisfied that such a wide principle of public policy exists. But, even were it to exist, it would not justify the *striking out* of the action. Ex hypothesi, the plaintiff would have a good cause of action for breach of contract, and the fact that his damages might well be nominal still entitles him to bring his action. He might well be content with a declaration which established that the defendant broke some important duty of secrecy and was therefore not to be trusted. Accordingly, this rule of English public policy, were it to exist, cannot support Mr. Hoffmann's contention that the action against B.T.T.C. should never have been brought and therefore that the proceedings

should be stopped in limine. It would merely preclude the right to recover more than nominal damages.

The action brought by Mr. Karoon against B.T.T.C. is in every sense an American action. The contract upon which the contractual claim is based was made in New York with a New York corporation. The proper law of that contract is American law and if according to American law a breach of that contract took place when B.T.T.C. divulged information to B.T., then the breach of that contract took place in New York. So far as the tort of conspiracy is concerned, the alleged conspirator who is being sued is a New York corporation and for an alleged conspiracy that took place in New York, because it was there that both the agreement and the overt acts in pursuance of that conspiracy were made and carried out. It will be for American law to determine whether the tort of conspiracy was committed and for this decision the New York court is the natural forum: see *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] A.C. 458. Further, the alleged invasion of privacy occurred in New York. It is a cause of action as yet unknown to English law and will have to be determined in accordance with New York law. In the result New York law will be the proper law for the determination of whether or not there has been a breach of contract and whether or not B.T.T.C. has committed the two torts alleged. New York law will also be the lex fori. In such circumstances it seems to me to be irrelevant that in England, assuming Mr. Hoffmann's submission to be correct, Mr. Karoon would have recovered only nominal damages for breach of contract.

As regards Mr. Hoffmann's second line of attack, he ultimately conceded that, if the corporate distinctions in law must not be overlooked and B.T.T.C. must be treated as a separate legal entity (as is indeed my view), then New York is the natural forum for the reasons to which I have recently referred. In such circumstances there is no need to consider the balance of legitimate juridical advantages. However, were we obliged to consider that matter, I do not think that Mr. Hoffmann would have seriously contended that the balance was other than in favour of the action remaining in New York. Mr. Karoon alleges on affidavit that as a result of B.T. successfully interpleading he has no funds to support his litigation. However, in America he can bring his claim because of the contingency fee system. The *Smith Kline* case [1983] 1 W.L.R. 730 was a decision on its own very special facts, where the Court of Appeal was clearly of the view that the plaintiff, who had legal aid in England, was abusing the contingency fee system in order to bring proceedings in America against the American parent corporation, against which he had no real cause of action. His cause of action, if any, lay against the English subsidiary and his conduct in bringing the American proceedings was clearly vexatious. Thus, in that case it was not a *legitimate* juridical advantage. Moreover, were Mr. Karoon to bring proceedings in England, he would inevitably be met with a claim for security of costs, being resident out of the jurisdiction, and this he could not, or would have great difficulty in meeting. He is of course faced with no such problems in the United States. It is common ground that under New York law he may well have a claim for exemplary damages. Although this is certainly not accepted by B.T., Mr. Karoon might, under New York law, be able to recover exemplary damages, even though he only obtained nominal damages for the alleged breach of contract and/or no actual damage for the torts of invasion of privacy or conpiracy.

In the end there is left only one unusual feature which will face the New York court. It will have to decide whether the provision by B.T.T.C. to B.T. of the information which B.T. subsequently put before the court in fact resulted in Mr. Karoon losing any real chance of either striking out the interpleader summons or obtaining summary relief under R.S.C., Ord. 17, r. 5—in short,

what probably would have happened in England if B.T.T.C. had not made the information available to B.T. Although this is an unusual inquiry for a New York court to make, it will, if and when required, be provided with expert evidence as to English law and procedure and should ultimately have no difficulty in resolving this issue.

I would accordingly dismiss this appeal.

Robert Goff L.J. The judge was faced with the following situation. The Bank of Tokyo Ltd., the appellant before this court ("B.T."), had commenced interpleader proceedings in this country. It had done so because there were moneys credited to accounts at its London branch to which competing claims were being made—on the one hand by an Iranian company, Maritime Co. Ltd. ("Maritime"), through a workers' council in Iran which, following the revolution in that country, appeared to have gained control of Maritime; and, on the other hand, by an Iranian gentleman, Mr. Karoon, the respondent before this court, who formerly controlled Maritime but who has, since the revolution in Iran, left that country and taken up residence in France. The interpleader proceedings have been complicated by the fact that Mr. Karoon, fearing that disclosure to Maritime of the existence of certain of these moneys might have an adverse effect on his family in Iran, sought to persuade the English court that no such disclosure should be allowed. That attempt has in fact failed, because disclosure was necessary to enable the interpleader issue to be tried. However, one of the steps which Mr. Karoon at one time took was to ask the English court to strike out the interpleader proceedings under R.S.C., Ord. 18, r. 19, his submission being that certain moneys which had been transferred to B.T.'s London branch from Mr. Karoon's personal account with the Bank of Tokyo Trust Co., the New York subsidiary of B.T. ("B.T.T.C."), were his own and were moreover moneys to which Maritime could have no arguable claim, so that they should not be the subject of the interpleader proceedings.

The commercial judge (who, it so happens, was myself) dismissed that application. A note of the judgment is before this court and shows that the basis of the decision was that the court considered that, having regard in particular to a letter emanating from the workers' council, B.T. had reasonable grounds for thinking that it might be sued by Maritime not only in respect of moneys of Maritime but also in repect of moneys of Mr. Karoon on the ground that they had emanated from Maritime, and that it would be wrong for the court to pre-empt the situation on the evidence of one party only. At all events, for the purposes of his application to strike out, Mr. Karoon swore an affidavit concerning the moneys which had been transferred from B.T.T.C., stating that those moneys had not originated from Maritime. As a result, B.T. made inquiries of B.T.T.C. about those moneys. B.T.T.C. then supplied information about the moneys to B.T., some of which was embodied in an affidavit sworn by Mr. Saunders of B.T. for the purpose of laying the information before the commercial judge when he dealt with Mr. Karoon's application to strike out.

Mr. Karoon has taken objection to his bankers in New York, B.T.T.C., supplying this information to B.T., and indeed he has objected to B.T. seeking to obtain the information from B.T.T.C. So, on 7 July 1983, he commenced proceedings in New York against both B.T. and B.T.T.C. In those proceedings he alleged (1) breach by B.T.T.C. of its contractual duty of confidence to him, in revealing the information to B.T.; (2) breach of contract by B.T. in obtaining the information; (3) violation by B.T.T.C. of Mr. Karoon's right of privacy; (4) conspiracy by B.T. and B.T.T.C.; and (5) that B.T. wrongfully induced B.T.T.C. to break its contract with Mr. Karoon.

On its application before the judge, B.T. asked for an order directing Mr. Karoon to discontinue the action in New York against B.T. and B.T.T.C.

and/or an injunction restraining Mr. Karoon from taking any further steps in the New York action or "commencing or pursuing any other proceedings relating to the same subject matter before any other court than this Honourable Court." The judge declined to make a mandatory order, but he maintained an injunction (which had earlier been granted ex parte) in terms expressly limited to the New York proceedings against B.T. The effect was that Mr. Karoon was free to prosecute his New York action against B.T.T.C. but not against B.T.

[His Lordship referred to the judgment of Bingham J. below, cited passages set out in the judgment of Ackner L.J., ante, pp. 49G—50C, 51C, D–H, 52B–G and continued:] B.T. has appealed to this court against the judge's decision, in so far as he failed to restrain Mr. Karoon from pursuing the New York action as against B.T.T.C. There is no cross-appeal by Mr. Karoon. This is for the simple practical reason that Mr. Karoon's New York action can continue just as well against B.T.T.C. alone. However, in so far as it may be necessary for the purposes of resisting B.T.'s appeal, Mr. Karoon has by his respondent's notice taken the point that the judge was wrong to continue the injunction restraining Mr. Karoon from further prosecuting the New York action against B.T.

Before the judge, Mr. Hoffmann for B.T. had argued that the New York proceedings would cause injustice to his clients for a number of reasons, viz: (1) the New York action was vexatious because (a) it was an attempt to penalise B.T. for availing itself of the interpleader proceedings in England, (b) it would involve re-litigating the question (already litigated here) whether an interpleader issue should have been ordered, and (c) it had no reasonable prospect of success; and (2) any action should be tried in England because (a) the interpleader proceedings were already here, (b) an English court could, without difficulty, resolve what duty of confidence is owed by a New York bank to its client, whereas a New York judge would be faced with difficult questions regarding English interpleader proceedings, (c) the question of ownership of the moneys had to be decided first anyway, and (d) the availability of a contingency fee to Mr. Karoon could not, on the authorities, be regarded as a juridical advantage to him. Before this court, however, Mr. Hoffmann's argument was somewhat different. The reason for the development of his argument was the intervening decision of the U.S. Court of Appeals in *Laker Airways Ltd. v. Sabena, Belgian World Airlines* (1984) 731 F. 2d 909 which was only decided on 6 March 1984 and so was not available to Bingham J. in the present case. Mr. Hoffmann drew on the analysis of Judge Wilkey, who delivered the majority judgment in that case, and urged this court to do likewise in considering the problem in the present case. In order to place Mr. Hoffmann's submissions in their context, it will be necessary briefly to summarise the relevant principles stated by Judge Wilkey. This is no easy task. The judgment is substantial both in content and in length. I have studied it with interest and, indeed, respect.

Laker Airways Ltd. v. Sabena, Belgian World Airlines is concerned with the unhappy clash of jurisdiction which has occurred between courts in this country and courts in the United States, following upon the commencement by the liquidators of Laker of antitrust proceedings in the United States against a number of international airlines, alleging that their combined activities were the cause of Laker's downfall. Among the airlines so sued were two British airlines, British Airways and British Caledonian. Following the making of an order by the Secretary of State for Trade and Industry in this country (acting under powers conferred on him by Act of Parliament) which had the effect of prohibiting the two British airlines from complying with "United States antitrust measures," the Court of Appeal in this country granted an injunction restraining Laker from taking any steps against British Airways and British Caledonian in the United States action: *British Airways Board v. Laker Airways Ltd.* [1984] Q.B. 142. Meanwhile, in the United States Laker obtained temporary restraining

orders from the District Court restraining other airlines from instituting in the courts in this country similar proceedings for an injunction. Two of those airlines, KLM and Sabena, challenged the District Court's preliminary injunction on appeal to the Court of Appeals. The Court of Appeals, by a majority, declined to overturn the injunction so granted.

In the course of his judgment Judge Wilkey analysed in depth the applicable principles of law. I am only concerned, for present purposes, with his consideration of the propriety of what he called "the antisuit injunction." I shall summarise the principles stated by him as briefly as I can, though I realise that so brief a summary cannot do justice to his reasoning.

(1) He observed, 731 F. 2d 909, 926–927, that the sufficiency of jurisdictional contacts with both the United States and England resulted in concurrent jurisdiction to prescribe.

> "However, the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other . . . For this reason, injunctions restraining litigants from proceeding in courts of independent countries are rarely issued," though "A second reason cautioning against exercise of the power is avoiding the impedance of the foreign jurisdiction."
> (2) "There are no precise rules governing the appropriateness of antisuit injunctions. The equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether, in the light of the principles outlined above, the injunction is required to prevent an irreparable miscarriage of justice."

However, (3) injunctions are most often necessary (a) to protect the jurisdiction of the enjoining court, or (b) to prevent the litigant's evasion of the important public policies of the forum.

(4) With regard to (3)(a) above, viz. protection of the jurisdiction of enjoining court, a distinction was drawn between cases where the enjoining court has proceeded to judgment on the merits, and cases where an injunction is requested to protect the court's jurisdiction before a judgment has been reached. In the former case there is little interference with the rule favouring parallel proceedings in matters subject to concurrent jurisdiction: so a court may protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation: see, e.g., *Bethell v. Peace* (1971) 441 F. 2d 495. In the latter case the factors which might support the issue of an injunction do not usually outweigh the importance of permitting foreign concurrent actions; and the policies underlying the rule permitting parallel proceedings in concurrent in personam actions are more properly considered in a motion for dismissal for forum non conveniens. Even so, there must be circumstances in which an antisuit injunction is necessary to conserve the court's ability to reach a judgment, and the District Court's injunction was proper on that basis.

(5) With regard to (3)(b) above, viz. preventing the litigant's evasion of the important public policies of the forum, an antisuit injunction will issue to preclude participation in the litigation only when the strongest equitable factors favour its use. Among the authorities cited by Judge Wilkey where such an injunction has issued was *Cole v. Cunningham* (1890) 133 U.S. 107, a case concerned with protecting the exercise of bankruptcy jurisdiction. Judge Wilkey further considered that the District Court's injunction properly prevented KLM and Sabena from attempting to escape the application of the United States antitrust laws to the conduct of business in the United States.

Mr. Hoffmann urged us to adopt a similar approach in the present case to that adopted by Judge Wilkey in his analysis, and in particular to distinguish, on

A the basis of both English and United States authorities, the two groups of cases where injunctions may be granted, viz. to protect the jurisdiction of the court and to prevent the litigant's evasion of the important public policies of the forum. The present case before us fell, submitted Mr. Hoffmann, within these principles. He asked us to approach the case by considering first whether, if B.T. in London and B.T.T.C. in New York had been a single entity and all relevant events had happened in England, proceedings in this country similar to B those commenced by Mr. Karoon in New York would have been struck out as an abuse of process. He submitted that they would, because such proceedings would have infringed both the public interest in making available all relevant evidence for the court and the public interest that there should be finality in litigation. That being so, he submitted that it made no difference that Mr. Karoon had commenced his proceedings not in this country but in New York, because the English court, in protecting the integrity of its own jurisdiction, C should not allow a litigant, subject to its jurisdiction, to bring such an action in a foreign jurisdiction. Furthermore, he submitted, having regard to the basis of the jurisdiction, the court should not be deflected from giving effect to its public policy by the fact that B.T. and B.T.T.C. are different legal entities; otherwise it would be sacrificing substance to form.

As an alternative to this main line of argument, Mr. Hoffmann invoked the principles enunciated by the House of Lords in recent cases concerned with alternative forums, viz. *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795 D and *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, and submitted that, on the "critical equation" referred to in those cases, the balance pointed towards requiring Mr. Karoon to litigate in England.

In considering Mr. Hoffmann's submissions, I recognise that it is not merely legitimate but desirable that courts in this country should pay due regard to developments in sister common law jurisdictions, notably the United States; this is especially desirable when the court is concerned with principles of law E affecting the relationship between our two jurisdictions and when we are presented with an analysis as profound as that of Judge Wilkey in *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F. 2d 909. Even so, we have to proceed with due caution. Not only do we have to operate within the confines of the doctrine of precedent in this country, but we have to bear in mind that the development of the relevant principles of law in our two countries may not be identical. Frequently, however, under the influence of history and of F practical pressures to which both jurisdictions are subject, it transpires that there have taken place in our two jurisdictions parallel developments which, though neither simultaneous nor identical, reveal a very similar trend.

This is just what we find in the case of what American lawyers call "antisuit injunctions." At bottom, the fundamental principles appear to have developed along similar lines. Thus, the jurisdiction is very wide, being available for exercise whenever justice demands the grant of an injunction. Again, the G English court does not attempt to restrain the foreign court, but operates in personam, restraining a party from instituting or prosecuting the suit in the foreign jurisdiction; though an injunction will only be granted to restrain a person who is regarded as being properly amenable to the jurisdiction of the English courts. Furthermore, it has been repeatedly stated that the jurisdiction must be exercised with extreme caution, indeed sparingly: this is partly because concurrent proceedings in different jurisdictions are tolerated, but also because H of a desire to avoid conflict with other jurisdictions. For it is accepted, as is indeed obvious, that courts of two different jurisdictions, one in this country and one in a foreign country, can have jurisdiction over the same dispute. It is not prima facie vexatious for the same plaintiff to commence two actions relating to the same subject matter, one in England and one abroad; but the court may be

less ready to tolerate suits in two jurisdictions in the case of actions in rem than it is in the case of actions in personam. All these principles are well-established, and indeed non-controversial, and appear to be common to both the English and the United States jurisdictions.

But the jurisdiction to grant such an injunction has only rarely been exercised in this country. The earliest cases in which the jurisdiction was established do not necessarily provide authoritative examples of its exercise today; indeed one of them (*Bushby v. Munday* (1821) 5 Madd. 297) was later to be described by Lord Brougham as going to the "very verge of the law" (see *Carron Iron Co. v. Maclaren* (1855) 5 H.L.Cas. 416, 446). In the course of the 19th century, there developed a line of cases in which assets were being administered by the English court, and one interested person sought to gain an advantage over other interested persons by prosecuting proceedings in a foreign country where part of the assets were situated. In such cases, for example, where a person sought in this way to gain the benefit of foreign assets of an estate after a decree of administration (see, e.g., *Graham v. Maxwell* (1849) 1 Mac. & G. 71), or of a bankrupt after his petition in bankruptcty (see, e.g., *In re Distin* (1871) 24 L.T. 157), or of a company after winding up proceedings had been commenced (see, e.g. *In re North Carolina Estate Co. Ltd.* (1889) 5 T.L.R. 328), such a person has been restrained by injunction from pursuing foreign proceedings, but only if he were a domiciled Englishman or otherwise amenable to the jurisdiction of the English court. In the later 19th century, however, following the decisions of the Court of Appeal in *McHenry v. Lewis* (1882) 22 Ch.D. 397 and *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225, it became accepted that, at least in the case of actions in personam, concurrent proceedings by the same party in this country and abroad were not prima facie vexatious, and the proceedings abroad should not therefore be restrained. It was for the party seeking an injunction to prove that the proceedings abroad were vexatious; for that purpose, he had generally to show that the plaintiff in the foreign court could not obtain an advantage from the foreign procedure which he could not obtain in the English court: see in particular *Hyam v. Helm* (1883) 24 Ch.D. 531, and *Cohen v. Rothfield* [1919] 1 K.B. 410. That criterion was very rarely fulfilled: for examples where it was fulfilled see *Armstrong v. Armstrong* [1892] P. 98, *Moore v. Moore* (1896) 12 T.L.R. 221 and *Christian v. Christian* (1897) 67 L.J.P. 18.

Injunctions have however also been granted to restrain proceedings brought in breach of contract (see *Lett v. Lett* [1906] 1 I.R. 618 and *The Tropaioforos (No. 2)* [1962] 1 Lloyd's Rep. 410), and to restrain enforcement of a judgment obtained fraudulently: see *Ellerman Lines Ltd. v. Read* [1928] 2 K.B. 144. Putting aside these latter cases, however, and without attempting to cut down the breadth of the jurisdiction, the golden thread running through the rare cases where an injunction has been granted appears to have been the protection of the jurisdiction; an injunction has been granted where it was considered necessary and proper for the protection of the exercise of the jurisdiction of the English court. This can be said not only of cases where assets were being administered by the English court but also of cases where proceedings abroad were restrained as vexatious, for a party who attempts to reap the benefit of proceeding vexatiously is interfering with the proper course of administration of justice here: for example, see *Armstrong v. Armstrong* [1892] P. 98, 101, *per* Jeune J. But there was this difference between these two groups of cases: that, whereas in the latter group the foreign proceedings were regarded as vexatious because the plaintiff could derive no advantage from them, in the former group he was restrained precisely because he might gain an advantage from the foreign proceedings.

Now at one time it was thought that the requirement that proceedings must be vexatious was applicable, not only to the exercise of the court's jurisdiction

to restrain a party from instituting or prosecuting foreign proceedings, but also to the exercise of the court's jurisdiction to stay proceedings commenced in this country: see again *McHenry v. Lewis,* 22 Ch.D. 397 and *Peruvian Guano Co. v. Bockwoldt,* 23 Ch.D. 225. A stay would only be granted if the continuance of the action in this country would be oppressive or vexatious to the defendant or otherwise an abuse of the process of the court, and if a stay would not cause an injustice to the plaintiff: see *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, *per* Greer L.J., at p. 392 and *per* Scott L.J., at p. 398. Again, these criteria were rarely fulfilled. However, in *The Atlantic Star* [1974] A.C. 436, the House of Lords recognised that this very rare restrictive criterion for staying proceedings in this country was too nationalistic: Lord Reid referred to it, at p. 453, as a "rather insular doctrine." In that case the court relaxed the criteria of "oppression" and "vexation." Four years later, in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, the House of Lords relaxed the criteria still further, abandoning altogether the criteria of "oppression" and "vexation," and adopting a principle which is now accepted to be indistinguishable from the principle of forum non conveniens as accepted in Scottish law: see *The Abidin Daver* [1984] A.C. 398. A parallel development has taken place in the United States: see *Gulf Oil Corporation v. Gilbert* (1947) 330 U.S. 501 and *Piper Aircraft Co. v. Reyno* (1981) 454 U.S. 235.

On these authorities it may be observed that there are strong similarities in the way in which the law on this topic has developed in both countries. However, in 1981 there occurred a development in this country which has sharply differentiated the two jurisdictions. In *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, Lord Scarman (who delivered a speech with which the remainder of the House of Lords agreed) treated the criteria applicable to the exercise of the court's discretion to impose a stay or grant an injunction as identical. He said, at p. 574: "It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings." After referring to *The Atlantic Star* [1974] A.C. 436, he quoted a passage from Lord Diplock's speech in *MacShannon's* case [1978] A.C. 795, 812, as embodying his distillation of principle in the case of a stay, which reads:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative: (*a*) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (*b*) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

Lord Scarman then said, at p. 575:

> "Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (*a*) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, *and* (*b*) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction. The formula is not, however, to be construed as a statute. No time should be spent in speculating as to what is meant by 'legitimate.' It, like the whole of the context, is but a guide to solving in the particular circumstances of the case the 'critical equation' between advantage to the plaintiff and disadvantage to the defendants."

Lord Scarman did not apparently consider it necessary to give reasons for his opinion that the principle is the same whether the remedy sought is a stay of

English proceedings or a restraint upon foreign proceedings, and that it was therefore unnecessary, having regard to the decisions of the House of Lords in *The Atlantic Star* [1974] A.C. 436 and *MacShannon's* case [1978] A.C. 795, both of which related only to a *stay* of *English* proceedings, to examine earlier case law on *restraint* of *foreign* proceedings. As I have recorded, it is now recognised that the principle applicable in the case of a stay of foreign proceedings is indistinguishable from the Scottish principle of forum non conveniens. This Latin tag is, like many others, misleading: proceedings in the English forum are stayed not because *England* is an *inconvenient* forum, but because there is another clearly more *appropriate* forum *abroad.* The classic statement of principle is to be found in the judgment of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665, 668, when, after stating that the court would not refuse to exercise its jurisdiction "upon the ground of a mere balance of convenience and inconvenience," he said that

> "the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

A similar principle was adopted by Lord Sumner in *Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français",* 1926 S.C. (H.L.) 13, 22, when he said that the object was to find "that forum which was the more suitable for the ends of justice."

It follows that the policy underlying the principle of forum non conveniens is a policy of declining to exercise jurisdiction where there is another clearly more appropriate forum; though, if in such circumstances trial in England would offer the plaintiff a real advantage, a balance must be struck and the court must decide in its discretion whether justice requires a stay. This policy, avowedly less nationalistic than the old principle of vexation or oppression as applied in the past in cases of stay of proceedings, is one which is given effect to, on an application by the defendant, by a court of the forum in which there have been commenced proceedings over which the court has jurisdiction. It is a self-denying ordinance. The principle (derived from the speeches of their Lordships in *MacShannon's* case [1978] A.C. 795) was so interpreted and applied in *Trendtex Trading Corporation v. Credit Suisse* [1980] Q.B. 629, with the approval of the House of Lords in that case, Lord Roskill [1982] A.C. 679, 705, describing the judge's approach as "entirely correct in principle." Furthermore, the exercise of the judge's discretion, so approved, in that case involved the granting of a stay, although the plaintiff was thereby deprived of a most valuable juridical advantage in this country, viz. discovery of documents in accordance with English rules of procedure. It appears therefore that a juridical advantage of the plaintiff in this country will not necessarily be decisive. (That this is indeed so can be illustrated by the often-quoted example of a road accident involving two motorists in a foreign country, both being resident nationals of that country: one seizes the opportunity given by the casual presence of the other in this country to serve proceedings upon him here, with the aim of recovering the higher damages available in the English courts. The English court would surely order a stay of proceedings on the application of the defendant, though the plaintiff's whole purpose in proceeding here was to obtain the juridical advantage of higher damages.) The decision of the House of Lords in the *Trendtex* case was followed by the Court of Appeal in *European Asian Bank A.G. v. Punjab & Sind Bank* [1982] 2 Lloyd's Rep. 356. The principles in these two cases, derived from all the speeches of the House of Lords in *MacShannon's* case [1978] A.C. 795 and approved by the House of Lords in the *Trendtex* case

[1982] A.C. 679, are, I understand, regularly followed in the Commercial Court, where cases of this kind tend to arise for decision.

In *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 Lord Scarman has taken the principle of forum non conveniens as developed in relation to a stay of English proceedings where it was expressly developed in order to adopt a *less* nationalistic approach, i.e. to render the English courts *less* tenacious of proceedings started within its jurisdiction, and has applied it *inversely* in cases of restraint by the English courts of foreign proceedings. The effect would appear to be, not only that in cases of restraint of foreign proceedings the very restrictive principle of protection of the English jurisdiction has been abandoned, but also that the English court will now be more free to grant injunctions restraining foreign proceedings than it was in the past under the old case law. We should perhaps not be surprised to discover that the approach of Lord Scarman in *Castanho* is different from the approach of courts in the United States. There, as here, the grant of stay of proceedings depends upon the application of the principle of forum non conveniens: see, e.g., *Piper Aircraft Co. v. Reyno,* 454 U.S. 235. But the grant of an injunction restraining foreign proceedings depends upon the twin principles of protection of the jurisdiction of the court of the forum, and of preventing evasion of important public policies of the forum; and in each case the principles have been stated and applied in restrictive terms. So cases of stay of proceedings and of restraint of foreign proceedings are regarded as being founded upon different principles. Furthermore, as appears from Judge Wilkey's opinion in *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909, in the United States it is considered more appropriate, where there is a clash of jurisdiction, for a stay of proceedings to be considered by the court seised of the matter rather than for a court to establish its own forum as the more appropriate forum by granting an injunction restraining proceedings in a foreign court.

Given the present divergence between the principles applicable in our two countries, it is, I fear, very difficult for this court to respond to Mr. Hoffmann's submission that we should proceed on the basis of Judge Wilkey's analysis in *Laker Airways Ltd. v. Sabena, Belgian World Airlines.* I can only console myself with the reflection that in any event Mr. Hoffmann's submission appears to me to involve an illegitimate extension, in at least two respects, of the principles as stated by Judge Wilkey, and indeed of the principle as developed in the long line of English cases before *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557.

I first address myself to the public interest that there should be finality in litigation. Such a public interest no doubt exists. Moreover, authorities can be found, both in this country and in the United States, in which courts have gone so far as to grant injunctions restraining persons properly amenable to their jurisdiction from relitigating abroad matters which have already been the subject of a judgment of the court of the forum. For an English example, see the old case of *Booth v. Leycester* (1837) 1 Keen 579; and for an American example, see *Bethell v. Peace,* 441 F.2d 495. *The Tropaioforos (No. 2)* [1962] 1 Lloyd's Rep. 410 could perhaps also be treated as falling under this head, though it contained the exceptional feature that the litigant sought to be restrained had entered into an agreement with all underwriters to be bound by the outcome of the proceedings, thereby providing a contractual basis for the grant of the injunction. However, I do not regard the present case as falling under this head of public policy. In the New York proceedings, Mr. Karoon is not, as I understand it, seeking to relitigate a matter which has been the subject of a judgment in this country. He is seeking rather to obtain redress from a bank in New York in respect of disclosure of confidential information by that bank in New York. I cannot see that the mere fact that Mr. Karoon had an opportunity,

which he did not take, to object to Mr. Saunders' affidavit being put in evidence on the striking out application in London has any effect on the situation. The simple fact is that the cause of action alleged by Mr. Karoon against B.T.T.C. has not been the subject of a judgment in this country. I can therefore see no basis for the submission of Mr. Hoffmann.

Mr. Hoffmann's second submission however raises more difficult problems. He asserted a public interest in making available all relevant evidence for the court. This public interest was, he submitted, exemplified by the rule that statements in affidavits are absolutely privileged in defamation proceedings (see *Trapp v. Mackie* [1979] 1 W.L.R. 377, 378–379, *per* Lord Diplock), and by the rule that victimisation of a witness on account of evidence he has given is a contempt of court: see *Chapman v. Honig* [1963] 2 Q.B. 502, 512, *per* Lord Denning M.R. His original submission before us was that, on this principle, B.T. could not be sued for adducing evidence in the interpleader summons. However, in the course of argument he recognised that the gravamen of his submission lay in a litigant seeking to recover damages in respect of the disclosure of material evidence in proceedings, when the only damage suffered was (it was submitted) a failure to achieve a result which would have been achieved had the material evidence not been disclosed. As a matter of public policy such damages should not, submitted Mr. Hoffmann, be recoverable in law.

Now this submission does indeed raise novel and difficult problems. It cannot be said to be entirely without substance, but it was not founded on any authority cited to us, either from this country or from the United States. Furthermore, if any such policy exists, as proposed by Mr. Hoffmann, it may be given effect to as part of the lex fori; and it does not necessarily follow that a court of this country would give effect to it by an injunction restraining proceedings in another jurisdiction. We have also always to bear in mind the restraint we must impose upon ourselves before taking any steps which might bear upon the exercise by the courts of another country of its own jurisdiction. However, in the present case, I must desist from exploring this interesting and novel proposition, because there is in my judgment a fatal obstacle to Mr. Hoffmann's argument. This is that the evidence in question was adduced in a court of this country not by B.T.T.C., but by B.T. The proceedings which Mr. Hoffmann is asking this court to restrain are proceedings by Mr. Karoon against B.T.T.C., in respect of their having divulged confidential information not to the English court but to B.T. I cannot for my part see that the public policy now asserted by Mr. Hoffmann should (assuming that it exists) provide any ground for restraining those proceedings. Mr. Hoffmann suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged. For this reason, I should in any event have dismissed this argument.

I turn then to consider Mr. Hoffmann's alternative submission which was founded upon Lord Scarman's speech in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557. This was to the effect that, applying the principles in *MacShannon's* case [1978] A.C. 795, the balance points towards requiring Mr. Karoon to litigate in England. He relied in this connection in particular upon the following factors: proceedings were already on foot in London between B.T. and Mr. Karoon; the issue whether Mr. Karoon was entitled to the moneys in question will in any event have to be decided in the interpleader issue in London; there is no dispute of fact over what happened in New York, and the principles of law on bankers' confidentiality in New York and London are substantially the same; the critical question whether the provision of information

caused any loss to Mr. Karoon would be better decided here; and Mr. Karoon has no legitimate juridical advantage in New York.

I have to confess that I find the consequences of this argument to be startling. There is no pending litigation in this country between Mr. Karoon and B.T.T.C.; that of itself would render any order by the English court restraining the action in New York a remarkable restraint upon the prosecution of proceedings in that state. Even if England were to be regarded by the English court as a clearly more appropriate forum, or the natural forum, for the trial of the action, I feel the gravest reservations about an English court granting an injunction restraining Mr. Karoon from proceeding in New York rather than allowing a court of that state, being the forum having jurisdiction where an action has already been commenced, making its own decision whether England is the more appropriate forum and whether it should in the circumstances grant a stay of proceedings. But in any event I am not prepared to hold that England is a clearly more appropriate forum for the trial of the action between Mr. Karoon and B.T.T.C. The cause of action arose in New York. One of the parties is a New York corporation: the other is an Iranian citizen resident in France. The applicable law is the law of the State of New York; and, even if New York law on breach of confidence by a banker shares a common origin with our own law on the subject, I am not prepared to assume in the present case that they are identical, and in any event there are other legal issues in the case (for example, a claim to penal damages). Taking into account the factors relied upon by Mr. Hoffmann, I cannot see that they displace the strong connection with the New York jurisdiction. That being so, on the principles expounded by the House of Lords in *MacShannon's* case [1978] A.C. 795, as interpreted with the approval of the House of Lords in the *Trendtex* case [1982] A.C. 679, there can be no basis, upon the inverse application of the principle of forum non conveniens, to grant an injunction restraining Mr. Karoon from continuing with his proceedings against B.T.T.C. in New York.

For these reasons, I would dismiss the appeal.

Appeal dismissed with costs.
Leave to appeal refused.
Injunctions to continue over hearing of petition for leave to appeal.

Solicitors: Herbert Smith & Co.; Baker & McKenzie.

[Reported by Mrs. Harriet Dutton, Barrister-at-Law]

[HOUSE OF LORDS]

ESSEX COUNTY COUNCIL . . . . . APPELLANT

AND

ROGERS AND ANOTHER . . . . . RESPONDENTS

[On appeal from ROGERS v. ESSEX COUNTY COUNCIL]

1986 July 28; Oct. 16

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Mackay of Clashfern, Lord Ackner and Lord Oliver of Aylmerton

Education—School—Attendance—"Walking distance"—Designated route along isolated unlit track—Whether "nearest available route"—Education Act 1944 (7 & 8 Geo. 6, c. 31), s. 39(2)(c)(5)[1]

S., a girl aged 12 years, and therefore of compulsory school age, was a registered pupil at a comprehensive school. The shortest route measured by the local education authority from her home to the school was 2·94 miles. Part of that route involved using an isolated and partly unmade track which was entirely unlit and which was extremely difficult to traverse in winter. Free transport was provided by the local education authority only for pupils who lived more than three miles from their schools. The girl's parents, regarded the shortest route to the school as unsuitable for their daughter and refused on principle to make any payment for school transport. On 17 April 1984 informations were preferred against the parents alleging that each of them was guilty of an offence against sections 39 and 40(1) of the Education Act 1944 in that their daughter had failed to attend regularly at the school. The justices convicted the parents. On the parents' appeal, the Crown Court upheld the conviction. On appeal, the Divisional Court of the Queen's Bench Division, distinguishing *Farrier v. Ward* [1954] 1 W.L.R. 306, allowed the appeal, and certified that the following point of law of general public importance was involved in their decision, namely, "whether the nearest available route by which the walking distance of a school from a child's home is to be measured for the purposes of the Education Act 1944 must be not merely the nearest route which a child can walk without trespassing but a route which a responsible parent could allow a child to use unaccompanied."

On appeal by the local authority:—

Held, allowing the appeal, that a route to be "available" within the meaning of section 39(5) of the Education Act 1944 had to be a route along which a child accompanied as necessary could walk with reasonable safety to school, and that it did not fail to qualify as "available" because of dangers which would arise if the child were to walk it unaccompanied (post, pp. 73B–D, 78D–F, 79B).

Farrier v. Ward [1954] 1 W.L.R. 306, D.C. approved.

Decision of the Divisional Court of the Queen's Bench Division [1985] 1 W.L.R. 700; [1985] 2 All E.R. 39 reversed.

[1] Education Act 1944, s. 39(2)(*c*)(5): see post, pp. 73G—74C.

A The following case is referred to in the opinion of Lord Ackner:

Farrier v. Ward [1954] 1 W.L.R. 306; sub nom. *Shaxted v. Ward* [1954] 1 All E.R. 336, D.C.

The following additional cases were cited in argument:

Barnes v. Hampshire County Council [1969] 1 W.L.R. 1563; [1969] 3 All E.R. 746, H.L.(E.)

B *Hares v. Curtin* [1913] 2 K.B. 328, D.C.

Jenkins v. Howells [1949] 2 K.B. 218; [1949] 1 All E.R. 942, D.C.

Lovett v. Payne [1980] R.T.R. 103, D.C.

Rootkin v. Kent County Council [1981] 1 W.L.R. 1186; [1981] 2 All E.R. 227, C.A.

Spiers v. Warrington Corporation [1954] 1 Q.B. 61; [1953] 3 W.L.R. 695; [1953] 2 All E.R. 1052, D.C.

C *Surrey County Council v. Ministry of Education* [1953] 1 W.L.R. 516; [1953] 1 All E.R. 705

APPEAL from the Divisional Court of the Queen's Bench Division.

This was an appeal by Essex County Council from the judgment dated 19 February 1985 of the Divisional Court of the Queen's Bench Division (Parker L.J. and Tudor Evans J.) allowing an appeal by the D defendants, Peter Albert Rogers and Violet Rogers, by case stated from a decision dated 13 July 1984 of the Crown Court, Chelmsford (Judge Martyn Ward) whereby the defendants' appeal from a decision dated 23 May 1984 of justices sitting at Colchester Magistrates' Court convicting each of the defendants of an offence under sections 39 and 40(1) of the Education Act 1944 and ordering that they both be conditionally E discharged for a period of 12 months, was dismissed but absolute discharges substituted therefor and ordering that the convictions of the defendants be quashed.

The Divisional Court of the Queen's Bench Division certified that a point of law of general public importance was involved in their decision (see post, p. 75F) and granted leave to appeal.

The facts are stated in the opinion of Lord Ackner. F

Conrad Dehn Q.C. and *David Mellor* for the local authority. The issue turns on the meaning of the word "available" and whether, in section 39(5) of the Act, Parliament was assuming that children would walk to school unaccompanied. The local authority is given a discretion to provide free transport where it is thought necessary because the G child's route to school is unsafe or dangerous or because of the child's frailty of health.

Section 39(2) of the Act provides, inter alia, that in any proceedings for an offence against section 39(1) the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom at any time when he was prevented from attending by sickness or any unavoidable cause; or if the parent proves that the school is not H within walking distance of the child's home and that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for enabling him to become a registered pupil at a school nearer to his home.

The effect of section 55, as amended by the Education (Miscellaneous Provisions) Act 1948, is that such arrangements, to be suitable, must be provided free of charge, and *Surrey County Council v. Ministry of Education* [1953] 1 W.L.R. 516 decided that the effect of sections 39(2), (5) and 55 was to impose a duty on the local education authority either to provide free transport or to reimburse the cost of reasonable travelling expenses for any child who lived more than three miles from his school.

It was held by the Divisional Court in *Spiers v. Warrington Corporation* [1954] 1 Q.B. 61, that the list of excuses in section 39(2) is exhaustive (apart from the defences given by section 54). In *Jenkins v. Howells* [1949] 2 K.B. 218, 220, the defence in section 39(2)(*a*) of "unavoidable cause" was held to apply only to a cause which actually affected the child. Under section 39(2)(*c*), on which the (parents) succeeded in the Divisional Court, the burden of proof is on the parent.

As to the definition of "available," see the *Shorter Oxford Dictionary* and the *Concise Oxford Dictionary*. The word "available" should be given its ordinary, natural meaning unless it leads to a result manifestly unintended by Parliament. In the present context it is the Divisional Court's construction which is untenable. For a judicial consideration of the meaning of "available," see *Lovett v. Payne* [1980] R.T.R. 103, 110, *per* Woolf J.

Section 39(5) is directed to the measurement of a distance and the word "available" means "existing and open physically and legally" as a route to walk along, and it does not and is not intended to prescribe or qualify the standard or safety of the route and in particular, it does not mean that (a) a hypothetical responsible parent would allow a child to use it unaccompanied, or, (b) a route is "non-available" because the child's parent (acting responsibly) does not allow the child to use it unaccompanied. Section 39(5) (which applies to all children of compulsory school age without distinction save between those under eight and those over seven years old) (a) makes no reference as to whether the child is or is not presumed to be accompanied, (b) is consistent with all children being accompanied and (c) is not consistent with no child being accompanied, since, it is obvious, for example, that no child of five, six or possibly seven years of age could be expected to walk *un*accompanied between, say, one and two miles to school, whatever the route, or to walk *un*accompanied any distance, however short, to school which involved, for example, crossing a busy main road (see *Farrier v. Ward* [1954] 1 W.L.R. 306, 307 and *Barnes v. Hampshire County Council* [1969] 1 W.L.R. 1563). Moreover, there would be few, if any, routes between two and three miles in length which a responsible parent would allow a child of eight or possibly nine years to use unaccompanied. It follows that the Act contemplates children being accompanied when it is referring to what is an available route. Section 39(5) was correctly interpreted in *Farrier v. Ward* [1954] 1 W.L.R. 306 and the construction placed upon the subsection is of general application and not restricted to cases where the particular parents thought the route unsafe when children were in a party, as, in effect, held by the Divisional Court in the present case.

It is the duty of parents to ensure that their children attend school and Parliament has left it open to parents to choose the method whereby they comply with that duty: see in particular sections 36 and 39(1) of the Act of 1944. Parliament must have recognised that in cases where free transport was not provided by the local education authority, responsible parents would decide whether their child should walk, and, if so, by what route and whether he should be accompanied, and, if so, by whom having regard to his age, sex, health and individual attributes and the length and dangers of the particular route in question.

To introduce the element of danger into the test as the Divisional Court have done in the present case is to hold that Parliament has changed the test to be applied without a change in language: see section 74 of the Elementary Education Act 1870, section 49 of the Education Act 1921 and *Hares v. Curtin* [1913] 2 K.B. 328, 331 and *Farrier v. Ward* [1954] 1 W.L.R 306. If the Divisional Court's construction in this case were right it would mean that, without a clear change in language, Parliament had brought about a substantial change in the law; the language of the provisions in 1870 and 1921 was the same and was clearly not concerned with whether a road, or route, was safe, let alone with whether a parent would give a child permission to use it unaccompanied. The fact that section 74 of the Act of 1870 and section 49 of the Act of 1921 did not exhaust all the reasonable excuses which might be made for the non-attendance of a child (*London County Council v. Maher* [1929] 2 K.B. 97, 103–104) is irrelevant. "Available route" was substituted for "road" in the Act of 1944 to cover routes which were not "roads."

A local education authority has a discretion under section 55 of the Act of 1944 to provide free transport in a case where the relevant walking distance is less than three miles (or, as the case may be, two miles), and in *Rootkin v. Kent County Council* [1981] 1 W.L.R. 1186, 1194, Lawton L.J. said that it might be appropriate to exercise that discretion if the route is hazardous (or the child is of a weak constitution).

Farrier v. Ward [1954] 1 W.L.R. 306 has been relied upon by local education authorities for over 30 years in thousands of instances, both in relation to questions involving the failure of children to attend regularly at school and in deciding, in relation to the provision of transport to school, whether they were under a statutory duty pursuant to section 55(1) of the Act of 1944 to provide it free or merely had a discretion either to do so under section 55, or to make a contribution to fares under that section to permit them to be carried for concessionary fares under section 12(1) of the Education (Miscellaneous Provisions) Act 1953, section 32(1)(*a*) of the Transport Act 1980 or section 46 of the Public Passenger Vehicles Act 1981; and the courts' long-standing construction of section 39(5) of the Act of 1944 should therefore not now be changed.

Considerations of policy are of considerable importance in a matter of the present nature. If the Divisional Court's construction is right any child of five, six or possibly seven years whose school was more than a few hundred yards from his home or within only a few hundred yards

from his home but across a busy main road, would have to be provided with free transport by the local education authority, although in practice, as Parliament must have known, such a child would always be accompanied so that free transport would not in fact be necessary; and that cannot be what Parliament intended. Moreover, the Divisional Court's test is uncertain and cannot have been intended by Parliament as it would produce unacceptable uncertainty and difficulties for local education authorities as may be seen from the following considerations. In the case of every child the local education authority has to consider and decide whether to provide free transport to school. If the Divisional Court's construction is right, for every suggested route to school for a child which would be less than two miles, or than three miles as the case might be, the local education authority would either (a) have to ascertain by inquiry whether the child's parent, acting responsibly, would or did allow the child to use that route unaccompanied or (b) whether a hypothetical responsible parent would allow a child or that child or a child of that age and/or sex to do so. This would involve the following problems: the local education authority would have to consider and decide whether they should follow course (a) or course (b); if (b) they would have to consider and decide whether the hypothetical child to be considered is (i) any child between five and 16 years; (ii) any child between five and eight or between seven and 16 years as the case might be; (iii) any child of the particular child's age (say, the same number of years old); (iv) any child of that child's age and sex; (v) that particular child, and there is no clear reason why it should be any one of these rather than any other: the result of the local education authority's consideration of this might well affect their final decision. In the second place, whatever the answers are to the problems postulated above, the following problems and uncertainties would remain; (i) how is the local education authority to decide the question whether the route in question is "available," that is, whether the particular parent is acting as a responsible parent in refusing permission, or whether a responsible parent would allow a child to use it unaccompanied? If the child in question is the particular child, must the local education authority ascertain his health attributes and, if so, how? The question whether the route is available would in many cases be difficult to answer, for example, where there is a busy and/or main road to cross, bearing in mind variations between children's common sense, experience and alertness. Presumably the local education authority would have to disregard any information they had as to whether (if free transport were lawfully not provided) any particular child would in fact be accompanied (even by his father or mother or older sibling who might be going along the same route to and from work or school or college at the same time), except in so far as this might go to show that a responsible parent would think the child needed to be accompanied. Thus the legal need for free transport would often be established by the absence of any need in fact.

It is the local education authority's contention that such uncertainty is inconsistent with Parliament's clear aim. Parliament provided that the relevant distance should be two miles for children under eight years of age and three miles for children over seven. Further, Parliament

provided for no change after the age of eight, the relevant distance being the same for children of eight and nine as for those of 13 or 14. Parliament provided therefore a certain change at, and only at, a child's eighth birthday, though it is obvious that the distance a child can walk does not increase by 50 per cent. overnight at that time and not again for at least six years. Parliament was plainly concerned here to make a clear, sharp rule for administrative convenience without regard to the particular abilities of different children. It is undesirable that section 39(5) should be so interpreted as to substitute for a test dependent upon readily-ascertainable, precise, objective criteria whereby entitlement to free transport can be accurately determined across the local education authority's area, a test such as that propounded by the Divisional Court in the present case which introduces factors dependent on subjective interpretation and is likely to give rise to many disputes over whether the criteria are satisfied in any particular circumstances as well as to accusations of uncertainty and consequently of unfairness of application.

In conclusion, (i) the restriction of available routes for the purposes of section 39 of the Act of 1944 to routes which a responsible parent would allow a child to use unaccompanied would have the effect of casting upon local education authorities burdens not contemplated by Parliament in as much as upon such an interpretation there would be very many more children than now who would be entitled, and possibly relatively few children who would not be entitled, to free school transport; (ii) the interpretation adopted by the Divisional Court would place a further undesirable additional burden upon local education authorities who would be obliged to consider and reconsider their provision of transport facilities (even in cases where the distances between home and school were short) in the light of transient changes in circumstances such as the current degree of crime in any particular area, changes in traffic flow and the like, which matters could be more suitably dealt with by appropriate action by parents or by the local education authority giving consideration to an appropriate exercise of their discretionary powers; (iii) the effect of the decision of the Divisional Court, if allowed to stand, is far-reaching in that in the present social conditions it would cast upon local education authorities the burden of providing free school transport regardless of the distance between a child's home and school in every case where a responsible parent might take the view that it was unsafe for a child (or that child as the case may be) to be abroad unaccompanied after dark and that such a wide-ranging duty as to school transport was clearly not contemplated by Parliament or by the words of section 39(5) of the Education Act 1944.

Gavin Lightman Q.C. and *Edward Irving* for the defendants. Section 39(2) of the Education Act 1944 furnishes a defence to the charge in the present case. Reliance is placed on the following propositions: (1) The words "nearest" and "available" both connote that the route is in fact suitable and therefore safe to be used by the child in question as a route to school. (2) As to the criterion of the safety of the route, that is, whether it is to be determined by reference to whether the child is to be accompanied or not, (a) save in the case of children who are too young to be allowed out on the road alone the criterion is the unaccompanied

child. Alternatively, (b), even if the criterion in the ordinary case is the accompanied child, nevertheless in a particular case the criterion will be the unaccompanied child if accompaniment is not reasonable or practicable. (3) In any case where there is no safe route for an unaccompanied child it is the duty of the local education authority under section 55 of the Act of 1944 to make arrangements for transport and so section 55(1) and section 39(2) complement each other and work in tandem so that the child obtains an education. (4) Since the Act of 1944 is a statute to reform the law and is not an Act consolidating the previous law, and the formula of the nearest available route was new to that Act, it is not appropriate to consider the previous law; but if it is legitimate to examine the previous law it will be found that there was also a defence in circumstances such as the present under the previous legislation.

(1) "Availability" does not mean the shortest route whatever the risk to the child. The word "nearest" has a like connotation: see *Lovett v. Payne* [1980] R.T.R. 103, 110, *per* Woolf J.

(2) A parent has a common law duty to protect his child and not to allow the child on the road unaccompanied until it is of an age to be allowed out alone on the roads. Section 39 is a penal provision. There may well be many cases where it is impracticable for the parent to provide any accompaniment. The test proposed is very much akin to that posited by Parker L.J. in the Divisional Court. The statutory language is directed to the availability of a route for the child and not to the question of accompaniment. In the case of a very young child it is obvious that no parent would allow it to go out alone. As to the alternative argument under this head, where the circumstances are such that accompaniment would be unreasonable or impracticable, it cannot be the law that the parent or child should be put in a dilemma.

As to (4) and the relevance of the previous legislation, the statutory predecessor of the Education Act 1944 was the Education Act 1921. Under section 49(*b*) of that Act there was a defence available to a parent that "there was no public elementary school open which the child can attend within such distance not exceeding three miles measured according to the nearest road from the residence of the child." There was also available a general defence of "reasonable excuse": see *London County Council v. Maher* [1929] K.B. 97. The Act of 1944 substituted for the words "measured according to the nearest road" the words "measured by the nearest available route" and removed the general defence of reasonable excuse: *Spiers v. Warrington Corporation* [1954] 1 Q.B. 61. It is the defendants' contention that the concept of reasonableness is preserved and imported in the word "available" and that accordingly the word "available" means "reasonably available" to the child in question.

In the Divisional Court, Parker L.J. (with whose judgment Tudor-Evans J. agreed) adopted as his criterion the responsible parent and held the test of the availability of a route to be whether such a parent would allow his child to walk along such a route unaccompanied. This construction gives effect to the natural meaning of the section and to the deliberate change in language in the Act of 1944.

Parker L.J. distinguished the judgment of the Divisional Court in *Farrier v. Ward* [1954] 1 W.L.R. 306 because that decision, unless distinguished, bound the court to dismiss the defendants' appeal. This distinction is adopted. Though *Farrier v. Ward* may be correct in so far as it is based upon the finding that the route in question was not unsafe (but was merely believed by the parents to be unsafe), the reasoning in the judgment so far as it discounts the word "available" and all safety considerations is wrong and ought to be disapproved.

Dehn Q.C. was not called upon to reply.

Their Lordships took time for consideration.

16 October. LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend Lord Ackner, with which I agree, I would allow the appeal and answer the certified question in the negative.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it and for the reasons which he gives I would allow the appeal and make no order as to costs.

LORD MACKAY OF CLASHFERN. My Lords, I have had the opportunity of reading in draft the speech prepared by Lord Ackner. I agree with it and concur in the order which he proposes.

LORD ACKNER. My Lords, the short question raised by this appeal is: who is to pay for the transport to the Stanway Comprehensive School of Shirley Rogers, a schoolgirl aged 12 at the material time? Should it be the appellants, the Essex County Council, which is the local education authority or the respondents, Shirley's parents? The appellants have offered Shirley the use of the school bus but subject to payment of the concessionary fare of £20 a term, the respondents not qualifying for free transport on a means test basis. The respondents, on principle, have refused to make any payment for school transport. The answer to the question is provided by the Education Act 1944 of which only a few sections need be referred to.

The Education Act 1944

Section 36 imposes upon parents the duty to secure the education of their children. It provides:

> "It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise."

Section 39 imposes the duty on parents to secure regular attendance of registered pupils. Shirley was registered at the Stanway school. The section provides:

> "(1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat, the parent of the child shall be guilty of an offence against this section. (2) In any proceedings for an offence against this section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave or—(*a*) at any time when he was prevented from attending by reason of sickness or any unavoidable cause; (*b*) on any day exclusively set apart for religious observance by the religious body to which his parent belongs; (*c*) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child's home, and that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for boarding accommodation for him at or near the school or for enabling him to become a registered pupil at a school nearer to his home. . . . (5) In this section the expression . . . 'walking distance' means, in relation to a child who has not attained the age of eight years two miles, and in the case of any other child three miles, measured by the nearest available route."

Section 55 relates to the provision of transport and other facilities. As amended by the Secretary of State for Education and Science Order 1964 (S.I. 1964 No. 490), art. 3(2)(*a*) and the Education (Miscellaneous Provisions) Act 1948, section 11, Schedule 1, Part I it provides:

> "(1) A local education authority shall make such arrangements for the provision of transport and otherwise as they consider necessary or as the Secretary of State may direct for the purpose of facilitating the attendance of pupils at schools or county colleges or at any course or class provided in pursuance of a scheme of further education in force for their area, and any transport provided in pursuance of such arrangements shall be provided free of charge. (2) A local education authority may pay the whole or any part, as the authority think fit, of the reasonable travelling expenses of any pupil in attendance at any school or county college or at any such course or class as aforesaid for whose transport no arrangements are made under this section."

This appeal is concerned with the "walking distance" from Shirley's home to her school and in particular whether "the nearest available route" exceeded three miles, she being in the older age group referred to in section 39(5) quoted above. The dispute arises in the following circumstances.

The facts

The distance from Shirley's home to the school by the shortest route is 2·94 miles. That route involves crossing Copford Plains by an isolated and partly unmade track which is entirely unlighted. In winter this route is one of considerable danger for a young girl who would have to walk over Copford Plains in darkness. Copford Plains are also extremely difficult to cross in winter and may be passable on foot in the morning

but impassable by the evening. There is an alternative route by metalled roads but this is 3·2 miles in length. The respondents quite reasonably regarded the Copford Plains route as unsuitable for use by Shirley, if unaccompanied. Thus, since as stated above, the appellants were only prepared to make the school bus available on payment of the concessionary fare, which the respondents were not willing to pay, Shirley stayed away from school during the period 13 December 1983 until 17 April 1984. Informations were then preferred against the respondents by the appellants alleging that the respondents were guilty of an offence against section 39. On 23 May 1984 the justices for the county of Essex sitting at Colchester, convicted the respondents and ordered that they both be conditionally discharged for a period of 12 months. The respondents appealed to the Crown Court at Chelmsford and on 13 July 1984 the appeal against conviction was dismissed. The appeal against sentence was allowed, to the extent of substituting absolute discharges for the conditional discharges imposed by the magistrates. The Crown Court expressed considerable sympathy for the respondents, but concluded that they were bound by the decision of the Divisional Court in *Farrier v. Ward* [1954] 1 W.L.R. 306.

The respondents appealed by case stated to the Divisional Court [1985] 1 W.L.R. 700. I have already set out the material facts which the Crown Court found. There was no finding that the route was impassable on any day that Shirley failed to attend or that the route was unsuitable, if she was accompanied. At the hearing of the appeal by the Divisional Court on 4 February 1985 the respondents repeated their contention that the nearest available route of which the walking distance from a child's home to his school is to be measured for the purposes of the Education Act 1944, must be, not merely the nearest route which a child can lawfully walk, but a route which a responsible parent would allow a child to use *unaccompanied*. In a reserved judgment Parker L.J., with whom Tudor Evans J. agreed, accepted this submission and distinguished *Farrier v. Ward* [1954] 1 W.L.R. 306. On 10 May 1985 the Divisional Court gave leave to appeal to your Lordships' House on terms that the appellants would not seek to disturb the order for costs in the Divisional Court and would pay the respondents' cost of this appeal in any event. The certified point of law of general public importance is in these terms:

> "Whether the nearest available route by which the walking distance of a school from a child's home is to be measured for the purposes of the Education Act 1944 must be not merely the nearest route which a child can walk without trespassing but a route which a responsible parent could allow a child to use unaccompanied."

Farrier v. Ward [1954] 1 W.L.R. 306

This decision is, of course, not binding on your Lordships' House and whether or not the Divisional Court was entitled to distinguish it, as it purported to do, is not an issue which need concern your Lordships. Nevertheless, it was a decision of a strong court, which has stood unchallenged for over 30 years and has been relied upon over that period by local education authorities. It involved considering the crucial

section 39(5) of the Act of 1944 and the facts of the case were similar to the facts in this appeal. It concerned two children who were under eight years of age and the route from their home to the school, at which they were registered pupils, was under two miles. The route was safe for the children to use, if escorted, but there was a particular portion of the road near the school where for small children, an escort would be desirable. The prosecutor contended that "available route" meant a route which could be followed without committing a trespass. The justices accepted this submission and the parents were convicted. They accordingly appealed by case stated.

At the outset of his judgment Lord Goddard C.J. said, at p. 307:

> "The short point that arises is this: The justices found that the route which these children had to travel was 'safe for these children to use, if escorted. The bit of road near the school, where an escort would be desirable for small children, was common to both the children in question.' I think that the justices recognised that it would be desirable for children to be escorted or in some way conducted along or across a certain piece of road where there was probably a good deal of traffic. They found that it was usual for parents to provide escort for their children to and from school, where necessary."

Having referred to section 39 of the Act Lord Goddard C.J. continued, at p. 308:

> "The justices have to find whether the school is within walking distance; and it is said that the route which the children took, which was under two miles, was not the 'nearest available route' because part of it was said to be dangerous for children to walk along unescorted. I cannot read the word 'available' as meaning necessarily safe, because we can see how these words came to be included in the Act."

Lord Goddard then considered the earlier Education Acts where the words "measured according to the nearest road" were used and concluded that the words in the Education Act 1944 "measured by the nearest available route" were not intended to make any change in the law. He then stated:

> "To some extent I sympathise with the views of the parents in this case, and it may be that they would like to bring pressure upon the Kent County Council to have a person on the road to see that 'this bit of the road,' as the justices call it, is safe for the children to cross. Those, however, are matters for the education authority to consider and to put into operation if they think fit. I can only say that, if there is a road which measures not more than two miles or a route along which a child can walk and its measurement does not exceed two miles, that is the nearest available route. It may sometimes be unsafe; sometimes the route might be flooded, and, if that happened and the person could not walk along the road, that might be a reasonable excuse for not using it on that particular day, but we are not concerned with that but with a case where the

parents think that the route is not safe. Parliament has not substituted safety as the test but the distance. Any question with regard to safety must be, and I have no doubt will be, taken into consideration by the education authority. In my opinion, therefore, the justices came to a right decision and the appeal fails."

Byrne and Parker JJ. both agreed.

It has been urged before us that in his judgment Lord Goddard C.J., when considering whether a route was available, was discounting all safety considerations. I cannot accept this submission. In the context in which the Lord Chief Justice made his observations, he was concerned with a route which was said to be dangerous *only* if the children walked along it *unescorted*.

The true meaning of "availability" in section 39(5) of the Act

In the submissions made to your Lordships it was common ground that "available" in the context of this subsection means "capable of being used." During the course of the argument Mr. Dehn on behalf of the appellants appeared reluctant to accept that for a route to be "available" it must be *reasonably* capable of being used. His reluctance seemed to stem from an anxiety on behalf of his clients not to accept the responsibility, from time to time, of deciding whether or not the route which is the nearest route, is reasonably capable of being used by a child of the relevant age, notwithstanding that under section 39(2)(*c*) the onus is clearly upon the parent to prove that the school is not within walking distance of the child's home. It is clear that the word "available" qualifies the word "route." The availability of the route cannot be determined by the mere study of a map. That it must be reasonably practicable for a child to walk along it to school does not, to my mind, admit of any argument. Of course, it must be free from obstructions or obstacles which would make its use impracticable. Dangers inherent in a particular route are factors that must be taken into account when considering its availability. A route which involved crossing a river by means of a footbridge would, other things being equal, qualify as an available route. However, if as a result, for example, of recent severe flooding, the bridge became unstable and unsafe to use, that route would cease to be available.

The short issue in this appeal is whether "availability" is to be measured by what is reasonable for an *unaccompanied child* to use? Mr. Lightman on behalf of the respondents was constrained to concede that in the case of a very young school child, certainly a child of five, six or seven, Parliament must have assumed that the child would be accompanied, however short the distance, if there existed any real hazard, e.g., crossing a busy road. Accordingly, there would be few, if any, routes in the first category provided for in section 39(5) (the two mile route), which any responsible parent would allow an unaccompanied child to use. If the availability of the route was to be measured by what is reasonable for an unaccompanied child who had not attained the age of eight years, there would have been no point in prescribing in the subsection the two mile route requirement. Any such child, with very

few exceptions, would have to be provided with free transport, although in practice, as Parliament must have appreciated, such a child would almost always be accompanied, so that the transport would not in fact have been necessary at all. This crucial point appears not to have been considered by the Divisional Court. It is certainly not referred to in the judgment of Parker L.J.

What then was the purpose of defining "walking distance" in relation to a child who had not attained the age of eight years? The answer, to my mind, is clear: it was simply to provide that where the nearest route from home to school was reasonably capable of being used by a child alone or (in the majority of cases) with an escort and did not exceed two miles, the school was within "walking distance" of the child's home. If, as is rightly conceded, the route does not in that situation fail to qualify as "available" because of dangers which would be consequent upon the child being unaccompanied, when, if at all, would the route thus fail to qualify? Mr. Lightman submits that once the child is of sufficient age to go out on a street alone, then if the route is not reasonably safe for the child to walk along it unaccompanied the route is not "available." Quite apart from the fact that there are no words in the section to support such a submission, the test suggested is hopelessly vague. What sort of street is one to have in mind, what sort of traffic is it to carry, what time of day, indeed what weather or season is to be assumed etc. etc? Further, is the test an objective test applicable to all children of a given age or is it to be applied subjectively to the particular child whose parents have raised the issue? The complete impracticability of such a test in itself persuades me that it was never in the contemplation of Parliament.

In my judgment a route to be "available" within the meaning of section 39(5) must be a route along which a child accompanied as necessary can walk and walk with reasonable safety to school. It does not fail to qualify as "available" because of dangers which would arise if the child is unaccompanied.

It has been argued that unless your Lordships decide that availability has to be measured by what is reasonable for an unaccompanied child, then parents who normally accompany their children, but who fail to do so temporarily, because of some crisis such as an illness, and as a result the child fails regularly to attend school, will have committed a criminal offence. In my judgment this submission overlooks section 39(2)(*a*) which provides that the child shall not be deemed to have failed to attend regularly, if he was prevented from attending by reason of "any unavoidable cause."

There is a final point which I would wish to stress. Under section 55 of the Act, which is set out in extenso above, the local education authority has a discretion to provide free transport where the relevant walking distance is less than three miles (or, as the case may be, two miles). The appellants in their written case fully accepted that if a local education authority failed unreasonably to exercise this discretion, it would be liable, on an application for judicial review to be ordered to carry out its statutory duty. In fact, in pursuance of their powers under section 55(2) the appellants, having been satisfied that the respondents

A did not qualify for free transport on a means test basis, in the exercise of this discretion offered the use of the school bus at the concessionary fare referred to above.

I would accordingly allow this appeal, discharge the order of the Divisional Court and would answer the certified point of law in the negative. In view of the appellants' undertaking not to disturb the order for costs made by the Divisional Court and to pay the costs of the B respondents of this appeal, I would make no order as to costs.

LORD OLIVER OF AYLMERTON. My Lords, I have had the opportunity of reading in draft the speech delivered by my noble and learned friend Lord Ackner. I agree with it and concur in the order which he proposes.

C *Appeal allowed.*
No order as to costs.

Solicitors: Solicitor, Essex County Council; Ellison & Co., Colchester.

J. A. G.

D

E [HOUSE OF LORDS]

POLLWAY NOMINEES LTD. . . . . RESPONDENT

AND

CROYDON LONDON BOROUGH COUNCIL . . APPELLANTS

F

1986 May 19, 20, 21; July 17

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Brightman, Lord Mackay of Clashfern and Lord Goff of Chieveley

Housing—Repairs—Local authority notice—Block of flats—Flats let on long leases at low rent—No parts in freeholder's possession— G *Freeholder responsible only for exterior repairs—Statutory notice to repair served on freeholder—No appeal by freeholder to county court—Whether High Court jurisdiction ousted—Whether freeholder person having control of house—Whether notice valid—Housing Act 1957 (5 & 6 Eliz. 2, c. 56), ss. 9(1A) (as inserted by Housing Act 1969 (c. 33), s. 72), 37(1), 39(2)*

The plaintiffs were the freehold reversioners of certain H premises consisting of a block of 42 flats. Of those 10 were let under a single agreement for a long lease to an associate company of the plaintiffs and each of the remaining was let for a long lease to individual tenants. The ground rents were small and amounted to only £1,135, whereas the full rental value of

the entire block was about £41,000. The net annual value for rating purposes was £10,000. Under the leases the freeholder remained in possession of the structure of the building and assumed the burden of repairing it and was entitled to recover the costs by an annual service charge. On 8 December 1982, the defendant council served on the plaintiffs, as the freeholders, notice under section 9(1A) of the Housing Act 1957[1] requiring them to carry out certain structural repairs. The plaintiffs did not appeal to the county court as provided by section 11 of the Act. The defendants served a notice of entry on 30 January 1984. The plaintiffs issued an originating summons seeking, inter alia, declarations that for the purposes of section 9(1A) of the Act of 1957 they were not "the person having control" of the premises and that the notice served on them under the subsection was a nullity. Harman J. made the declarations. On appeal by the defendants, the Court of Appeal dismissed the appeal.

On appeal by the defendants:—

Held, dismissing the appeal, (1) that although an appeal to the county court under section 11 of the Housing Act 1957 against a notice under section 9 was the appropriate procedure for challenging whether there were grounds justifying the service of the notice, section 37 did not validate a notice which was invalid and that where the validity of the notice under section 9 was in question section 37 did not oust the High Court jurisdiction (post, pp. 90B–D, 95F—96B, 98E–F).

(2) That since it was accepted that the purpose-built block of flats was a single "house" for the purposes of the Act, the person (or persons) in "control" of the house under the provisions of section 39(2) was the person who would be entitled to receive the rack rent, for the definition was only apt to apply to those whose interest in the property entitled them to dispose of the right of occupation and it was for the right of occupation that rack rents were paid; that in the case of a house comprising a number of residential units let on long leases at ground rents, the definition applied collectively to all the long leaseholders who between them either received the rack rent of units sub-let at rack rents or would receive the rack rents if the units were so sub-let; that, accordingly, the plaintiffs as freeholders with only a reversionary interest which conferred no right of occupation which they could enjoy themselves or let to any other person, were not "a person having control of the house" within the subsection; and that, therefore, the notice under section 9(1A) of the Act served on the plaintiffs was a nullity (post, pp. 91A–C, 94G—95B, F—96B, 97F).

Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake [1894] 2 Q.B. 774, D.C. and *London Corporation v. Cusack-Smith* [1955] A.C. 337, H.L.(E.) applied.

Per curiam. A building originally constructed as a single dwelling-house does not cease to be a "house" for the purposes of the Housing Act 1957 if it is internally converted into a number of separate residential units which are then sold off on long leases (post, p. 90E–F).

[1] Housing Act 1957, s. 9(1A): see post, p. 89E.
S. 37(1): see post, p. 89G–H.
S. 39(2): see post, p. 90A–B.

A *Quaere*. Whether a modern purpose-built block of flats is a "house" to which the provisions of section 39(2) of the Act of 1957 apply (post, p. 90D–E).

Decision of the Court of Appeal [1986] Ch. 198; [1985] 3 W.L.R. 564; [1985] 3 All E.R. 24 affirmed.

The following cases are referred to in their Lordships' opinions:

B *Bowditch v. Wakefield Local Board of Health* (1871) L.R. 6 Q.B. 567

Clackson v. Bromley London Borough Council (unreported), 22 March 1982, McNeill J.

London Corporation v. Cusack-Smith [1955] A.C. 337; [1955] 2 W.L.R. 363; [1955] 1 All E.R. 302, H.L.(E.)

Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake [1894] 2 Q.B. 774, D.C.

Wright v. Ingle (1885) 16 Q.B.D. 379, C.A.

C

The following additional cases were cited in argument:

Elliott v. Brighton Borough Council (1980) 79 L.G.R. 506, C.A.

Kensington Borough Council v. Allen [1926] 1 K.B. 576, D.C.

Rawlance v. Croydon Corporation [1952] 2 Q.B. 803; [1952] 2 All E.R. 535, C.A.

D *Reg. v. Greenwich London Borough Council, Ex parte Patel,* The Times, 5 July 1985, C.A.

Reg. v. Secretary of State for the Environment, Ex parte Ostler [1977] Q.B. 122; [1976] 3 W.L.R. 288; [1976] 3 All E.R. 90, C.A.

APPEAL from the Court of Appeal.

This was an appeal, by leave of the House of Lords (Lord Keith of E Kinkel, Lord Roskill and Lord Mackay of Clashfern) given on 28 November 1985, by the defendants, Croydon London Borough Council, from the judgment dated 24 May 1985 of the Court of Appeal (Oliver and Mustill L.JJ. and Sir Roualeyn Cumming-Bruce) dismissing an appeal against the judgment and order dated 11 May 1984 of Harman J. declaring that the plaintiffs, Pollway Nominees Ltd., were not the person having control of certain premises known as Crown Point, F Beulah Hill, London S.E.19, for the purposes of section 9 of the Housing Act 1957 and that a notice served by the defendants on the plaintiffs on 8 December 1982 under section 9(1A) of that Act was for that reason a nullity.

The facts are set out in the opinion of Lord Bridge of Harwich.

G *Michael Barnes Q.C.* and *Robin Campbell* for the defendants. The main issue in this appeal is whether the plaintiffs are the "person having control" of the premises in the light of the definition of that expression contained in section 39(2) of the Housing Act 1957. This expression is one which is found in many statutes concerning public law, for example, in housing, public health and town planning legislation and goes back to the first half of the last century. The purpose of such a definition as that H contained in section 39(2) is to fix upon whom in relation to a particular property the statutory machinery will work.

For the scheme of the Housing Act 1957 for present purposes, see sections 9(1), (1A) (added by the Housing Act 1969), (2), 10(1), (2),

(3), (5), 11(1), (2), (3), 18(1), 37(1), 39(2), 189—the definitions of "house" and "owner." The definition in section 39(2) evinces the endeavour of the legislature to find the person who has an interest in the whole house. The defendants concede that in section 39(2) "person" must mean a single person or a group of persons having the same interest. In the present case the freeholder is the only person who has an interest in the whole house. Further, it is the defendants' contention that any building which contains various residential units is a house if the predominant use of the building is residential.

The following matters were common ground in the Court of Appeal and are for the purposes of the present appeal, namely, (a) the building comprising the 42 flats at Crown Point is a house for the purposes of section 9(1A) of the Act. (b) The house is not in fact let at a rack rent. A "rack rent" is defined by section 39(2) to mean a rent of not less than two thirds of the full net annual value of the house. The total of the rents received by the plaintiffs from Halydene Ltd. and from the individual tenants is less than a rack rent. (c) The definition of a person having control of a house in section 39(2) may usefully be regarded as containing two alternative limbs, namely (i) the person who receives the rack rent, and (ii) the person who would receive the rack rent if the house were let at a rack rent. Since there is no person who does receive a rack rent it is the second limb which is directly relevant to the present proceedings. (b) The words in section 39(2) "whether on his own account or as agent or trustees for any other person" are not relevant here.

As stated earlier, the definition in section 39(2) of the person having control of the house is a definition which in its essentials is the same as that found in wide areas of public law where a single person has to be identified as the person who is "the owner" of, or "the person having control" of, property. Examples in other statutes are the Building Act 1984; section 126 for the purposes of, for example, sections 59(1), 64(1), 72; the Town and Country Planning Act 1971, section 290(1), for the purposes of, for example, sections 58(1), 65(1), 87(5); the Highways Act 1980, section 329(1), for the purposes of, for example, sections 141(2), 151(1), 152(1), 165(1). Usually a person has to be ascertained under the definition with the object of statutory responsibilities being imposed on him. But sometimes a person has to be ascertained in order that he may obtain certain statutory benefits, for example, under section 180 of the Town and Country Planning Act 1971 which permits the owner of land in certain circumstances to serve a purchase notice on the local planning authority. For an analysis under earlier planning legislation of "owners" in a definition section almost identical to section 39(2) of the Housing Act 1957, see *London Corporation v. Cusack-Smith* [1955] A.C. 337.

It is plain that in order to apply the second limb of section 39(2) of the Housing Act 1957 there has to be assumed a letting of the whole house. In theory, given the existing structure of interests in this block of flats, there are three ways in which it could be let at a rack rent: (i) the plaintiffs could let it at a rack rent. This letting would be made subject to the actual leases in favour of Halydene Ltd. and the individual long lease holders. It would thus be a lease of the reversion. (ii) The

plaintiffs (as owners of the structure). Halydene Ltd. and the 32 long lease holders could join together to let the house at a rack rent. Such a lease would take effect subject to the leases in favour of the existing Rent Act sub tenancies. It would thus be in part a lease with vacant possession (as regards 32 flats) and in part a lease of the reversion (as regards 10 flats). (iii) The plaintiffs, the 32 long lease holders and the 10 Rent Act tenants could join together to let the house at a rack rent. Such a lease would be wholly with vacant possession.

It is quite possible in law for any of the above leases to be granted. None would be prohibited by the existence of any present actual interest. But in practice it is extremely unlikely that any of the three would be granted for economic or other reasons. If the correct hypothesis is the first of the above examples, the application of the second limb of section 39(2) results in the plaintiffs being the person having control. If it is the second, the application of the second limb results in the plaintiffs, Halydene Ltd. and the 32 long lease holders being together the persons having control. If it is the third, the application of the second limb results in the plaintiffs, the 10 Rent Act tenants and the 32 long lease holders being together the persons having control. In the light of the purpose of the definition, which is to isolate one person with an interest in the whole house as the person with the statutory responsibilities, the first is the correct hypothesis.

The Court of Appeal recognised the simplicity and convenience of the above result, and also recognised there was nothing in the language of section 39(2) which prevented its adoption. However, the court advanced three reasons for rejecting it. None of these is a good reason.

The first reason given by the Court of Appeal was that the court considered that the letting to be assumed for the purposes of the second limb of section 39(2) had to be a letting with vacant possession. But there is nothing in the language or policy of section 39(2) which makes a letting with vacant possession a necessary hypothesis in all cases where the second limb is applied.

The second reason given is that the Court of Appeal considered that the first hypothesis, a lease of the reversion granted by the plaintiffs, was contrary to the principle that in applying the second limb of section 39(2) all actual interests in the premises must be taken as subsisting. This principle is not disputed, and indeed, derives in part from the decision of this House in *London Corporation v. Cusack-Smith* [1955] A.C. 337. However, the first hypothesis, is perfectly consistent with the principle since the letting assumed would be subject to and with the benefit of the existing leases in the premises. The only impediment to such a letting would be not the existence of the actual leases but the fact that it would be financially unattractive to any tenant. But it is well established by authority that the existence of some contractual, fiduciary or financial impediment does not prevent a letting being assumed for the purposes of the second limb of the definition: see *Bowditch v. Wakefield Local Board of Health* (1871) L.R. 6 Q.B. 567 and *Wright v. Ingle* (1885) 16 Q.B.D. 379.

The third reason for rejecting the first hypothesis is that it was considered to be contrary to the decision in *London Corporation v.*

Cusack-Smith [1955] A.C. 337. In that case there was a letting by A to B at a rent less than a rack rent. The question was whether under the second limb of the definition in section 119 of the Town and Planning Act 1947 (the definition, as previously stated, being one in all essentials the same as the present) A or B was the "owner" of the property. Two possible means of applying the second limb were considered. One was that the existing lease from A to B should be ignored and an assumed new lease at a rack rent substituted for it. The other was that a new sub-letting by B at a rack rent should be assumed. It was held that the second was the correct means of applying the second limb so that B was the owner. The interest of A and B extended to the whole of the premises, so that no question arose of a situation such as the present where a number of people have interests in parts of the premises but only one person has an interest in the whole. The true ratio decidendi of that case establishes two principles. The first is that in applying the second limb of the definition all actual interests in the property are assumed to subsist. As has already been stated, this principle is in no way inimical to the result for which the defendants contend. The second principle is that on the actual facts of that case the assumed letting at a rack rent was by B. This principle is not of assistance to the present case where the facts are different and involve persons with an interest in a part only of the premises. Accordingly, in so far as it lays down any principles of general application, the decision in *London Corporation v. Cusack-Smith* [1955] A.C. 337 is not contrary to the arguments advanced by the defendants on this issue.

It is conceded that *Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake* [1894] 2 Q.B. 774, on the face of it is against the defendants' argument, but it is not realistic in circumstances such as the present to hold that the 42 tenants and the freeholder together are able to grant a lease at a rack rent of the whole of the property. Where, as here, a freeholder of a block of flats lets out the various flats on long leases at low rents retaining the structure and the common parts, there are three possible solutions to the present problem: (i) that no one is the owner, or that (ii) the freeholder and all the tenants together are the owner, or that (iii) the freeholder alone is the owner. The first solution is extremely unsatisfactory because the object of the section is to find a person who is the owner, because provisions in the Housing Act 1957, and in other statutes, could not be applied to a block of flats such as the present at all. It would mean that where these words appear in public health legislation if the property was a dangerous structure there would be no one on whom the local authority could serve a notice to rectify the situation. The second solution is also very unsatisfactory in that (a) it runs contrary to the root purpose of the statutory definition which is to ascertain one person with an interest in the whole property who is to bear the statutory responsibilities and obtain the statutory benefits, and (b) it will render the application of many statutory provisions to a property either very difficult or quite impractical from the point of view of both the local authorities concerned and the various persons with interests in part of the property. In this connection reliance is placed on the unreported judgment of McNeill J. in *Clackson v. Bromley London*

Borough Council where it was pointed out that many persons would become responsible for expenses for work over which they had no control and (under other legislation) could even become subject to criminal penalties in respect of matters, or failures to act, over which they had no control. On the other hand, the third solution has the advantages that it is consistent with the root purpose of the definition; it is consistent with the statutory language; it is not contrary to the ratio decidendi of any decided authority and it renders the statutory provisions in question simple and convenient to operate. It is not contended that there is a perfect solution to the present problem but the defendants' proposed solution does not do violence to the language of section 39(2) and further, it provides a common sense solution to the problem. [Reference was made to *Kensington Borough Council v. Allen* [1926] 1 K.B. 576.]

The other issue that arises in this appeal is whether the plaintiffs, having failed to appeal to the county court under section 11 of the Act, are precluded from challenging the validity of the notice served on them under section 9(1A) on the ground that they are not the person having control of the premises by reason of the provision in section 37(1) that the notice shall be final and conclusive as to matters which could have been raised on such an appeal.

This issue only arises if, contrary to the above submission, the plaintiffs were not the person having control of the premises. The Court of Appeal held that the challenge to the notice raised in these proceedings was not precluded by section 37(1) of the Act because the failure to serve the notice on the person having control of the house was something that went to the essential validity of the notice. But the correct question to be asked is whether the failure rendered the notice a nullity in law. The failure did not render the notice a nullity. The question whether the plaintiffs were the person having control of the premises is a question which could have been raised on an appeal to the county court under section 11: see *Elliott v. Brighton Borough Council* (1980) 79 L.G.R. 506 which held that points which could be taken under section 11 were not confined to questions of merit but went also to questions of validity. See also *Reg. v. Greenwich London Borough Council, Ex parte Patel*, The Times, 5 July 1985, which is relied on. Accordingly, the notice is final and conclusive as to the plaintiffs being in control of the premises and the question purportedly raised in these proceedings cannot be so raised. Section 37(1) can bear no other construction.

If the failure to serve the notice on the correctly selected person having control of the premises renders it a nullity the argument against the defendants is that section 37(1) has no preclusive effect because there has never been a notice at all. But against this contention there must be set the consideration that the plain purpose of the legislation was to prevent any defect of any sort which could have been raised in an appeal to the county court being raised in any other proceedings. In this context no fine distinction should be drawn between various phrases which are used in statutes to exclude the jurisdiction of the courts, for

example, "final and conclusive," "shall not be challenged (questioned) in any legal proceedings." In the light of such preclusive or excluding language even a matter which would render an administrative Act a nullity cannot be raised in the court providing the Act is administrative and not judicial and provided that the exclusion clause is not total but gives some opportunity for legal challenge to the administrative Act. For an example of the approach of the courts to this type of question: see *Reg. v. Secretary of State for the Environment, Ex parte Ostler* [1977] Q.B. 122, 134.

John S. Colyer Q.C. and *Jill Gibson* for the plaintiffs. It was accepted below that this block of flats could constitute a "house" for the purpose of Part 2 of the Housing Act 1957, but it does not follow that because the plaintiffs are the freeholders they can satisfy the definition of "the person having control of the house" in section 39(2).

The plaintiffs accept that section 39(2) is divided into two limbs. The first limb is applied if it can be applied and therefore if there can be found some one who actually receives the rack rent of the house there is no need to consider the subsection further. Accordingly, *Kensington Borough Council v. Allen* [1926] 1 K.B. 576 is of no assistance. In the present case since there is no person who actually receives the rack rent of the house, it is necessary to consider the second limb of section 39(2) which is directed to a hypothetical letting at a rack rent. In *Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake* [1894] 2 Q.B. 774 which was concerned with the definition of "owner" in section 141 of the Public Health (London) Act 1891 where the same formula was used as in section 39(2) of the Act of 1957, Kennedy J. said, at p. 778, "It appears to us to be impossible to treat as the person who would receive the rack rent . . . persons who, at the time when the 'owner' of the premises . . . has to be found, have not such an interest in the property that, if it was let at a rack rent, they would receive such rack rent. The words of the section, in our judgment, in the case of there being no-one who receives rack rent from the actual occupier, designate as 'owner' the person who 'rebus sic stantibus,' that is to say, with the interests in the premises as they then are, would, if they were let to an occupier at a rack rent, receive that rack rent." Oliver L.J. below [1986] Ch. 198, 208G accepting that construction, said that he saw no logical answer to the question posed by the plaintiffs below: "What is there in section 39 which leads to the conclusion that, when the premises concerned are let to two or more persons, their estates are to be ignored, although, if they are let to one person, his estate is not to be ignored?" That is the absolute kernel of this issue.

The defendants' argument has proceeded on the basis that there must be found a single person who is in control of the premises. But there is nothing in the language of section 39(2) that stipulates such a requirement. Moreover, the defendants have to accept that where there is a plurality of persons in control resulting from a severance of the freehold or property which is not united, the statutory definition breaks down. It is to be observed that although the local authority cannot serve a notice on the house as such, they can serve notices under section 18 on the individual dwellings that comprise the property. The defendants'

A construction of section 39(2) is unsatisfactory and would very easily open up ways of eroding its provisions.

As to the difficulties of service where premises are in multiple ownership, these are not so great as has been suggested. Further, since 1964, section 103(1) of the Housing Act 1964 alleviates the difficulties. Section 103(2) supports the proposition that where the "person" is composite the local authority must serve all parts of the composite B person. As to the problem where there is a plurality of ownership and the difficulty of determining whether there had been a decision to comply with the terms of the notice, this factor could equally apply to an indecisive individual having control of the whole premises, or where the owner is a company whose board of directors are in disarray over the issue.

C As regards the difficulties postulated by McNeill J. in *Clackson v. Bromley London Borough Council* (unreported), where a local authority is faced with a dangerous structure which appears to be the subject of multiple ownership the solution is for the local authority to take action under section 58(2) of the Public Health Act 1936.

Section 14 of the Housing Act 1957 envisages that there may be a plurality of person who constitute the owner of the property in question. D The definition of "owner" in section 189(1) postulates that the rents and profits may be received by more than one person. If the House proceeds on the assumption that the construction of section 39(2) adopted by the Court of Appeal is correct, then it follows that in respect of any property there is always some person or persons who satisfy the statutory definition. In this connection it is pertinent to observe that it could E never have been contemplated in 1848 that buildings would be in multiple ownership which is a common occurrence at the present time.

The question to be answered in respect of the second limb of section 39(2) of the Act of 1957, is "who is the person who would receive the rack rent if the house were let at a rack rent?" In answering that question the following principles, which were accepted by the Court of Appeal, have to be applied. The relevant test is a factual one, and it is F necessary to take the estates in the land as they actually are at the relevant time and to ascertain who in those circumstances would receive the rack rent of the property if it were in fact let at a rack rent: *London Corporation v. Cusack-Smith* [1955] A.C. 337. Further, the hypothetical letting at a rack rent postulated by the second limb of the subsection is to a tenant in actual occupation: *Truman, Hanbury, Buxton & Co. v.* G *Kerslake* [1884] 1 Q.B. 774.

Applying these principles to the facts of the present case, where the freeholder has let off most of the parts of the "house" on many long leases at ground rents, it is clear that if there was now granted a single lease to an occupying tenant at a rack rent, the freeholder would not be entitled to receive that rack rent. The freeholder cannot, therefore, satisfy the second limb of the definition in section 39(2) of the Act. The H Court of Appeal applied the above test and correctly held that the freeholder was therefore not "the person having control of the house."

It follows that there are situations—and the present case is one of them—where there is no single person "having control" of the house.

This would equally be the case where the house were built in part upon land owned by A and in part on land owned by B (whether the ownership of the freehold of the house be severed horizontally, so as to produce a flying freehold, or whether it be severed laterally).

In a case where there is no one person who can fulfil the definition, the statutory definition either: (i) cannot be fulfilled at all in those circumstances (if the Act only contemplates only one such person) or, alternatively, (ii) there are a number of persons who, collectively, form together "the person having control" of the house since they together would comprise the reversioners to the hypothetical lease at a rack rent and would together be entitled to the rack rent, for example, A + B in the case of the house built upon both A's land and B's land. The plaintiffs are not the person "having control" of the house in either case (that is to say, whether the statutory language does not produce a "person having control" or whether one person alone is not the "person having control").

Gibson following. As to whether in fact there is a lacuna in the Housing Act 1957 in relation to the problem raised by the circumstances of the present case, there is a lacuna that can only be filled by Parliament, for it is to be remembered that the language of section 39(2) first appears in the Town Clauses Act 1848. That Act embodies the Victorian philosophy that the person who receives the full value of the land should bear the burden of repairs and obtain any public benefits. In 1848 the present situation in relation to multiple ownership was never envisaged. Moreover it is to be observed that section 9 of the Housing Act 1936 is for present purposes in the same terms as section 9 of the Housing Act 1957. The Housing Act 1936 related to housing for the working classes—Parliament in 1957 could not have foreseen that during the 1960's leases of flats at rack rents would become unattractive because of (a) the Rent Acts and (b) rising property prices and that therefore long leases at low rents would replace them.

Barnes Q.C. in reply.

Their Lordships took time for consideration.

17 July. Lord Bridge of Harwich. My Lords, the respondent company is the freehold owner of a block of flats known as Crown Point, Beulah Hill in the London Borough of Croydon. The appellants are the local authority. Crown Point comprises 42 flats in all. Under an agreement for a lease to be granted by the respondent company to an associated or subsidiary company, Halydene Ltd., 10 of the flats are let for 99 years from 24 June 1979 at the current annual rent of £50 a flat. These 10 flats are occupied by tenants protected by the Rent Acts who pay the appropriate controlled rents, amounting in the aggregate to just under £10,000 per annum, to Halydene Ltd. The remaining 32 flats are occupied by lessees holding under 99-year leases. One such lease is in evidence. Presumably it is typical of the remainder. The term commences on 24 June 1976. The annual rent is £25 rising to £75 during the term. The demised premises are so defined as to exclude both the common parts and the whole of the structure of the building. The lessor covenants

A to keep the structure in repair, but is entitled to recover a defined proportion of the cost from the lessee by way of service charge.

On 8 December 1982 the local authority served on the respondent a notice under section 9(1A) of the Housing Act 1957 requiring it to carry out substantial repairs to the roof of the building and minor external repairs to the windows of one of the flats. Nothing having been done in response to this notice, the local authority on 30 January 1984 served B notice under section 10(2) of their intention to enter the premises and carry out the work themselves. This provoked the issue by the respondent of the originating summons instituting these proceedings and claiming declarations that the respondent was not the "person having control" of Crown Point under Part II of the Act of 1957 and that accordingly the notice of 8 December 1982 was a nullity. The declarations sought were C granted by Harman J. An appeal from his judgment was dismissed by the Court of Appeal (Oliver and Mustill L.JJ. and Sir Roualeyn Cumming-Bruce) [1986] Ch. 198. The local authority now appeal by leave of your Lordships' House.

The scheme of Part II of the Act of 1957, as originally enacted, was concerned with the maintenance of houses in a state of fitness for human D habitation, their repair if they were unfit and could be rendered fit at reasonable cost, their demolition or closure if they could not. The fasciculus of sections beginning with section 9 is headed "Unfit premises capable of repair at reasonable cost." But the ambit of compulsory repairs that can be required has been enlarged by the addition of section 9(1A) by section 72 of the Housing Act 1969. Under that subsection, if the local authority are satisfied that a house

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> "is in such a state of disrepair that, although it is not unfit for human habitation, substantial repairs are required to bring it up to a reasonable standard, having regard to its age, character and locality, they may serve upon the person having control of the house a notice requiring him"

F to carry out specified repairs. The consequence of failure to comply is that the local authority may enter and carry out the works themselves and, following upon a demand, recover the expenses incurred from "the person having control of the house": section 10. A "person aggrieved" by a notice requiring the execution of works under section 9 or a demand for the recovery of expenses incurred by a local authority in executing work under section 10 has a right of appeal to the county G court under section 11. Section 37(1) provides:

> "Any notice, demand or order against which an appeal might be brought to a county court under this Part of this Act shall, if no such appeal is brought, become operative on the expiration of 21 days from the date of the service of the notice, demand or order, and shall be final and conclusive as to any matters which could have H been raised on such an appeal . . . "

The crucial definition on which the main issue raised by this appeal turns is contained in section 39(2), which provides:

"For the purposes of this Part of this Act, the person who receives the rack rent of a house, whether on his own account or as agent or trustee for any other person, or who would so receive it if the house were let at a rack rent, shall be deemed to be the person having control of the house. In this subsection the expression 'rack rent' means rent which is not less than two-thirds of the full net annual value of the house."

The main issue is whether the respondent falls within the definition of "the person having control of the house." But the local authority raise a subsidiary point. The respondent failed to appeal under section 11 against the notice of 8 December 1982. The question whether the respondent is the "person having control of the house" is, it is submitted, a matter which could have been raised on such an appeal and accordingly the failure to appeal within due time renders the notice final and conclusive as to that matter under section 37(1). Neither court below had any hesitation in rejecting that submission. Nor have I. The statute requires that a notice under section 9 be served on the person having control of the house. A notice not so served has no statutory force or effect at all.

The main issue has been argued both in the Court of Appeal and before your Lordships on the footing that Crown Point can properly be regarded as a "house" within the meaning of section 9 of the Act of 1957. In so far as that may involve an admission of fact by the respondent, it is, of course, open to a party to make any admission of fact he chooses. But in so far as the matter proceeds upon a concession of law that a modern purpose-built block of flats is a "house" to which the provisions we are considering apply, I am by no means prepared to accept it as necessarily correct. We have heard no argument on the point and I refrain from expressing any opinion on it one way or the other. I apprehend, however, that a building originally constructed as a single dwellinghouse does not cease to be a "house" under the Act if it is internally converted into a number of separate residential units which are then sold off on long leases, as commonly happens as an incident of a familiar form of contemporary property development. Accordingly, even if we may be addressing an artificial problem in relation to Crown Point, the question how the definition applies to a building which is undoubtedly a house where the separate residential units within the house are all let on long leases at ground rents is one that requires to be answered.

It is not disputed that the rack rents of the 10 flats comprised within the letting to Halydene Ltd. are received by Halydene Ltd., not by the respondent company. The remaining 32 flats are not sub-let at rack rents but, if they were, the individual sub-lessors would in each case be the persons entitled to receive them. The argument for the local authority is that the respondent company, being the only person entitled to dispose of any interest in the entire property which constitutes "the house," must be the person who would receive the rack rent of the house if it were let at a rack rent. It matters not, according to the argument, that the respondent's only interest is in reversion and that in the real world

A no one would pay a rack rent for a reversionary lease of premises let at ground rents. Such a letting is theoretically possible and it therefore follows, the local authority submit, that the respondent is the "person having control of the house" on the true construction of the definition.

The argument for the respondent is that the definition is only apt to apply to a person whose interest in the property entitles him to dispose of the right of occupation. It is for the right of occupation that rack B rents are paid. Hence the person entitled to grant that right will receive the rack rent if the property is let at a rack rent or would receive it if it were so let. In the case of a house comprising a multiplicity of residential units let on long leases at ground rents, there is either no person to whom the definition can apply or the definition applies collectively to all the long leaseholders who between them either receive the rack rents of C units sub-let at rack rents or would receive the rack rents if the units were so sub-let.

The formula which we find in section 39(2) of the Act of 1957 is one with a long statutory history. It has been used in a wide variety of legislative contexts, most commonly for the purpose of identifying the person entitled to that interest in property upon whom Parliament thought it appropriate to impose some obligation to undertake work on D or in connection with the property required in the public interest or to meet a proportionate share of the cost of public works from which the property would derive the benefit. The language in which the formula is expressed is not always identical, but minor verbal differences do not, I believe, affect the essential concept which the formula is intended to embody. It would be tedious to embark on anything like a comprehensive E review of statutory uses of the formula or of the obligations imposed on those to whom the formula applies. A few examples will suffice. Thus in the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), section 3 provides that:

> "The word 'owner', used with reference to any lands or buildings in respect of which any work is required to be done, or any rate to be paid, under this or the special Act, shall mean the person for the F time being entitled to receive, or who, if such lands or buildings were let to a tenant at a rack rent, would be entitled to receive, the rack rent from the occupier thereof: . . ."

In the series of Public Health Acts from 1848 to 1936 the definition of "owner" has remained essentially unchanged and is stated in section G 343 of the Act of 1936 as meaning:

> "the person for the time being receiving the rack rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if those premises were let at a rack rent; . . ."

H A modern variant is found in section 329(1) of the Highways Act 1980 which provides that:

> "'owner', in relation to any premises, means a person, other than a mortgagee not in possession, who, whether in his own right or as

trustee or agent for any other person, is entitled to receive the rack rent of the premises or, where the premises are not let at a rack rent, would be so entitled if the premises were so let; . . ."

The series of Public Health Acts from 1848 to 1936 provide useful illustrations of the kind of obligations imposed by Parliament on the "owner" of premises as defined by the formula. Thus it is the owner of premises abutting on a new street who is ultimately made liable, in proportion to his share of the frontage, for the cost of making up the street by sewering, levelling, paving, etc.: Act of 1875, section 150. If a building lacks satisfactory provision for drainage, it is upon the owner that the cost of making such provision falls: Act of 1936, section 39. If earth closets require to be replaced by water closets, the cost is to be shared equally between the local authority and the owner: Act of 1936, section 47. If a building or structure is in a dangerous condition, the local authority may require the owner to repair it or demolish it: Act of 1936, section 58.

In all these cases the rationale of the use of the formula to designate the person upon whom the relevant obligation is cast is surely plain. The owner of that interest in premises which carries with it the right, actual or potential, to receive the rack rent, as the measure of the value of the premises to an occupier, is the person who ought in justice to be responsible for the discharge of the liabilities to which the premises by reason of their situation or condition give rise.

The authority most directly in point for present purposes is *Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake* [1894] 2 Q.B. 774. That was a case arising under the Public Health (London) Act 1891 where the definition of "owner" in section 141 was in identical terms to that used in section 343 of the Public Health Act 1936. The statute imposed liability to remedy a statutory nuisance on the "owner of the premises on which such nuisance arises." Failure by the owner to comply with the notice requiring him to abate such a nuisance was an offence. The appellants were convicted of failure to comply with a notice requiring abatement of a nuisance arising on premises of which they were the head-lessees. The premises were sub-let at less than a rack rent. Delivering the judgment of the Divisional Court allowing the appeal, Kennedy J. said, at pp. 778, 779:

> "In our opinion the court of quarter sessions was wrong in holding the appellants to be 'owners' within the meaning of this enactment. It appears to us to be impossible to treat as the person who would receive the rack rent, if the premises were let at a rack rent, persons who, at the time when the 'owner' of premises, as defined by section 141, has to be found, have not such an interest in the property that, if it was let at a rack rent, they would receive such rack rent. The words of the section in our judgment, in the case of there being no one who in fact receives a rack rent from the actual occupier, designate as 'owner' the person who 'rebus sic stantibus,' that is to say, with the interests in the premises as they then are, would, if they were let to an occupier at a rack rent, receive that rack rent.

A "In this case, whilst the sub-lease to Aslett subsists, that is to say, for the next 30½ years and until a date only 11 days anterior to the expiring of the appellants' own interests, the appellants could not let to any one. The only person who could let the premises at a rack rent, the only person whose interest in the premises places him in a position to receive a rack rent, is Bishop, the assignee of the sub-lease to Aslett. His interest as assignee of that sub-lease gives B him the power of so letting; and if the premises were so let, he is the person who would receive the rack rent. He chooses, it is true, to occupy the premises himself; but we see nothing to prevent the same person being both occupier of the premises and the 'owner' within the meaning of this section."

C The formula was considered by your Lordships' House in somewhat unusual circumstances in *London Corporation v. Cusack-Smith* [1955] A.C. 337. There the appellants held a long lease at less than a rack rent; the respondents were the freeholders. The building comprised in the lease had been destroyed by enemy action and applicable legislation relieved the lessees of liability to pay rent until the site was again built upon. Upon refusal of planning permission for rebuilding, the freeholders D served a purchase notice under section 19(1) of the Town and Country Planning Act 1947 requiring the corporation, as local planning authority, to acquire their interest in the premises. The majority (Lord Reid, Lord Tucker and Lord Keith of Avonholm) held that the freeholders were not "owners" within the definition in section 119(1) of the Act of 1947, which, save that it refers to "a person" rather than "the person," embodies the same formula as that which we have to construe. Lord E Oaksey and Lord Porter dissented.

I say that the circumstances were unusual, since this was one instance where, on the majority holding, the formula used in the definition fell to be applied for the purpose of conferring a benefit, not of imposing a liability. Lord Oaksey based his dissent on the view that the definition in section 119(1) was excluded by the context from application to "any F owner" entitled to serve a purchase notice under section 19. Lord Porter concluded that both the freeholder and the leaseholder might be an "owner" within the definition. But the reasoning of the majority affirms and follows the decision in *Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake*. Lord Reid said, at p. 360:

> G "one looks for the person who at the relevant date would be entitled to make a new lease at a rack rent and supposes that he does so, and the only person entitled to make a new lease is the person in possession, in this case the appellants."

He added, at p. 361:

> H "Finally, it is, I think, important to observe that for a very long time the definition of 'owner' in the Public Health Acts has been in substantially the same terms as the definition in this Act, and in a case under the Public Health (London) Act 1891, *Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake* [1894] 2 Q.B. 774, where there were a lease and a sublease both at rents less than rack rents, it was held

that the sublessee was the 'owner.' Where Parliament has continued to use words of which the meaning has been settled by decisions of the court it is to be presumed that Parliament intends the words to continue to have that meaning."

Lord Keith of Avonholm said, at p. 369:

"I cannot accept the view which commended itself to Denning L.J. and Romer L.J. that the definition can be divorced so far from actuality as to cover the case of a person who could have let the land in the past at a rack rent, if he had not chosen to let it at less than a rack rent. The natural way to construe the definition in its application to an actual case is, in my opinion, to ask, who is entitled to let the land at a rack rent as things are today? I am strengthened in my view by the fact that this was the construction put upon a substantially similar definition in the case of *Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake*, and that, whereas an entirely different definition of owner was introduced into the Town and Country Planning Act 1944, and the Acquisition of Land (Authorisation Procedure) Act 1946, the legislature in 1947 reverted to a definition which has appeared repeatedly in earlier legislation. It must be assumed that Parliament knew of the judicial interpretation that had been put on the old definition."

Mr. Barnes, for the local authority, has relied on *Bowditch v. Wakefield Local Board of Health* (1871) L.R. 6 Q.B. 567 and *Wright v. Ingle* (1885) 16 Q.B.D. 379. Both these cases concerned the liability of frontagers to contribute to the cost of private street-works. In the first case the frontage property was held by trustees who, under the terms of the trust, could only use it as a school. In the second case the property was held on trust for use as a Wesleyan chapel. In neither case was the inhibition imposed by the trust on the use which could be made of the property held to exempt the trustees from liability as "owners" within the relevant definition. These cases show, so it is argued, that an owner of premises may be the person who "would receive the rack rent of the premises if the premises were let at a rack rent" notwithstanding some legal impediment which would prevent the premises being let at a rack rent in fact. I cannot accept that these authorities throw any light on the application of the definition to the case where the freeholder has let the premises at less than a rack rent, albeit in sub-divided units, so that he no longer has any right in possession at his disposal.

The question raised by the instant appeal has, perhaps surprisingly, only once been previously considered by the courts in a case which, even more surprisingly, is not reported. In *Clackson v. Bromley London Borough Council,* decided on 22 March 1982, McNeill J. held that a dangerous structure notice under section 58 of the Public Health Act 1936 had been validly served on the freeholder of a block of 12 flats all let on 99 year leases at nominal ground rents. The judge, after extensive examination of the authorities, concluded that the freeholder alone was the person who would receive the rack rent of the premises if the premises were let at a rack rent.

I am afraid I cannot agree. It seems to me, as it did to the Court of Appeal, that the principle clearly embodied in the reasoning in *Truman, Hanbury, Buxton & Co. Ltd. v. Kerslake* [1894] 2 Q.B. 774 and *London Corporation v. Cusack-Smith* [1955] A.C. 337 is applicable not only where the freeholder has let the entire premises under a single lease at less than a rack rent, but equally where he has granted separate leases of all the separate units capable of occupation comprised within the building at rents which in the aggregate are less than the rack rent of the building and thus retains only a reversionary interest which confers no right of occupation which he can either enjoy for himself or let to anyone else. Moreover, this conclusion is, in my view, entirely in accordance with the philosophy which underlies the formula used in the definition.

I appreciate that this conclusion may cause inconvenience for local authorities. But I imagine that normally the contractual rights of the owners of long leasehold interests in flats to enforce repairing obligations against their lessors will provide an adequate solution of the problem. This may be the explanation of the fact that, though the formula found in the definition has been in common use in statutes since at least 1847, it was not until 1982 that its application to buildings divided into units let on long leases had to be considered by the courts. The truth, I suspect, is that generations of parliamentary draftsmen have been content to use the time-honoured formula without ever contemplating its application to the circumstances presently under consideration. That must surely be true of section 39(2) of the Act of 1957 which simply re-enacts the formula first used in its present context in section 17(1) of the Housing Act 1930. That Act introduced the compulsory procedure which we now see in expanded and amended form in Part II of the Act of 1957 requiring "the person having control of the house" to effect repairs to a house which was unfit for human habitation and which was "occupied or is of a type suitable for occupation by persons of the working classes." The draftsman in 1930 can hardly be blamed if it did not occur to him to make suitable provision for dealing with problems arising from flats let on long leases at low rents.

I would dismiss the appeal with costs.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Lord Brightman. My Lords, I also agree that this appeal should be dismissed. I have had the benefit of reading in advance the speech of my noble and learned friend Lord Bridge of Harwich, and I concur in his reasoning on both issues.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Bridge of Harwich and Lord Goff of Chieveley. Like Lord

Goff, I was much attracted by Mr. Barnes' excellent argument. However, as Mr. Colyer submitted in one branch of his argument, it appears that the intention of the Act was that there should always be a person or persons having control of any relevant house so that the statutory machinery will be able to operate in relation to that house. It is fundamental to Mr. Barnes' argument that where there is no person who alone or jointly with other persons has an interest, whether as a leaseholder or freeholder, in the whole house, no person or persons have control of the house within the meaning of the Act. For this reason, in my opinion, his argument fails, and this appeal should be dismissed. I also agree with the further reasoning given by my noble and learned friends for reaching this conclusion.

Lord Goff of Chieveley. My Lords, I must confess to having been much attracted by Mr. Barnes' admirable argument. At first sight, it seemed so startling and unpractical a result that "the person having control" of the house in the present case (assuming, as I do, that it is a house for the purposes of the Housing Act 1957) should be 43 persons having interests in different parts of the house, that such a result could not have been intended by Parliament. Moreover, strong support for Mr. Barnes' argument can be derived from the statute itself. It is common ground that the question which we have to decide is a question of construction of section 39(2) of the Act, read, of course, in its statutory context. It is also common ground that there are two limbs to the definition of "the person having control of the house"; and that it is necessary to identify that person by first looking for a person who falls within the first limb, i.e. is the person who receives the rack rent of the relevant house, whether on his own account or as agent or trustee for any other person, and then, if there is no such person, to identify the relevant person by looking for the person who falls within the second limb, i.e. is the person who would so (i.e., whether on his own account or as agent or trustee for any other person) receive it (i.e., the rack rent of the relevant house) if the house were let at a rack rent. It is plain moreover that the rack rent so referred to must be the rack rent of the whole house. This is because the words used in the first limb are "*the* rack rent of *a* house." Those words cannot be read (even with the aid of the Interpretation Act 1889) as meaning "the total of the rack rents of all the constituent parts of a house"; if reinforcement for that view is needed, it is to be found in the fact that, in the final sentence of the subsection, rack rent is defined with reference to "the full net annual value of *the* house." On this basis, Mr. Barnes was able to mount a formidable argument that the person having control of a house must have been intended to be a person having an interest in the whole of the relevant house; though this would obviously embrace a number of persons who together held a joint interest in the whole of the house. Such an interest could, of course, be freehold or leasehold; and if freehold and leasehold interests co-existed in the whole of the relevant house, a choice would have to be made. It was this latter problem that this House had to consider in *London Corporation v. Cusack-Smith* [1955] A.C. 337.

As I have said, I found this argument to be most attractive. First of all, it seemed to me to provide a sensible answer in those cases where a freeholder had let off parts of the house in separate dwellings, while retaining part of the structure (e.g., the roof, or a common staircase) which did not itself constitute a dwelling—a case which would not be solved by section 18 of the Act because, if the part of the structure retained by the landlord were to fall into disrepair, under section 18 the local authority could not treat it as a house. Second, there are strong indications in other parts of the Act which support the view that it was contemplated that the "person in control of the house" should be a person (or persons) having a single interest in the house. In particular, the provisions for serving of notices under section 9 do not grapple with the problem of service where the person in control of the house consists of a number of persons having interests in different parts of the house; and, if the local authority itself expends money in carrying out work of repair, there is a significant silence in the Act as to whether a person having an interest in a part of the house unaffected by the repairs should be liable to pay, or as to how, if all persons having interests in different parts of the house are liable to pay, the expense is to be apportioned between them. In this connection, it is of interest that section 13 is drawn in terms which appear to contemplate that only a person having a single interest in the whole house should be held responsible. Such a conclusion would moreover, in my opinion, only conflict with the evident underlying purpose, stressed in the speech of my noble and learned friend, Lord Bridge of Harwich, that the person enjoying, or capable of enjoying, the economic benefit of the house should be the person upon whom the burden of notices under section 9 of the Act should fall, to the extent that that policy must give way to a countervailing policy that there must be a clearly identifiable person upon whom the notice shall be served, especially as that person can always pass the economic consequences of the burden on to his lessees when they are responsible for the relevant repairs under the terms of any applicable lease.

Nevertheless, in the end, I feel driven by the words of section 39(2) itself to reach the same conclusion as that reached by the Court of Appeal. This is because I feel that it must have been the intention of the Act that there shall always be a person having control of any relevant house, so that the statutory machinery must operate in relation to that house. And the inevitable consequence of Mr. Barnes' argument is, as I see it, that, upon his construction, the statutory machinery could never operate in a case where a house is in divided ownership—whether because of the existence of flying freeholds in different parts of the house, or because (as we are told may happen) the house is in divided ownership because it is constructed upon land belonging to two separate freeholders. In such cases, there can be no single interest in the whole house; and, on Mr. Barnes' construction, there can be no person having control of the house. This must, I consider, be inconsistent with the intention of the legislature. Furthermore, in agreement with the Court of Appeal, I consider that the words "the person who receives the rack rent of the house" in the first limb of section 39(2) can, with the aid of the Interpretation Act 1889, be read as applicable to the case where a

number of persons, having interests in different parts of the house which together comprise the totality of the house, join together to grant a lease of the whole house at a single rack rent. Such a result may, in the circumstances of the present case, be exceedingly improbable; it may also create a considerable inconvenience for the local authority; but it is, as I read it, capable of falling within the statutory definition.

I am fortified in this conclusion by what appear to me to be two important considerations. First, although this solution can obviously create difficulties for local authorities in the serving of notices, those difficulties are not insuperable, especially having regard to the provisions of section 103 of the Housing Act 1964. Second, the difficulties so created are, in my opinion, far outweighed by the fact that, on Mr. Barnes' construction, well-advised landlords could so arrange their affairs as to ensure that their property escaped from the provisions of the Act, by simply providing that one part of the relevant house (e.g., the roof or the common staircase) was vested in a separate freehold owner, for example a subsidiary company of the landlord. This would be a most undesirable state of affairs, which cannot, I think, have been intended by the legislature.

The conclusion which I have reached is therefore consistent with both the decision and the reasoning of the majority of this House in *London Corporation v. Cusack-Smith*. I wish, however, to say that, if I had been persuaded by Mr. Barnes' argument as to the construction of the statute, I would not have felt inhibited by that decision from accepting his argument, which was, I consider, focused upon a different question, viz. how to choose between two persons who both hold a single interest in the whole house—a question which I regard as being not so fundamental as the question which we have had to consider in the present case.

For these reasons, I find myself to be in agreement with the decision of the Court of Appeal on the main point in the case. Since I, like the remainder of your Lordships, am also in agreement with the conclusion of the Court of Appeal on the subsidiary point, I too would dismiss the appeal.

Appeal dismissed.

Solicitors: Controller of Administration, Croydon London Borough Council; Bernstein & Co.

J. A. G.

[PRIVY COUNCIL]

HUA CHIAO COMMERCIAL BANK LTD. . . . . APPELLANT

AND

CHIAPHUA INDUSTRIES LTD. . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1986 Oct. 27, 28; Nov. 25

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Oliver of Aylmerton, Lord Goff of Chieveley and Sir Ivor Richardson

Landlord and Tenant—Assignment of lease or underletting—Effect of assignment—Deposit payable by tenant at commencement of lease to secure performance of tenant's covenants—Landlord to return deposit to tenant at expiration of term without breach of covenant by tenant—Whether obligation to return deposit passing to assignee of reversion

Hong Kong—Land—Lease—Deposit paid by tenant as security for performance of covenants—Landlord's assignment of lease—Whether assignee liable to repay deposit to tenant

The landlord granted the tenant a lease of premises in Hong Kong for five years. The lease provided that the expressions "the landlord" and "the tenant" where the context so admitted should include their assigns. Clause 4(h) provided that the tenant should pay to the landlord a sum equivalent to two months' rent as a security deposit on or before the signing of the lease, and if there was no breach of any of the terms and conditions on the part of the tenant the deposit should be returned to the tenant at the expiration of the term, but otherwise it should be absolutely forfeited to the landlord as liquidated damages without prejudice to the landlord's right of action against the tenant for any of the breaches. The tenant paid the deposit and the landlord subsequently mortgaged its interest in the reversion to the bank by assignment with provision for re-assignment upon redemption, but no reference was made to the deposit. The landlord having defaulted the bank entered into possession. The landlord went into liquidation. The tenant committed no breach of covenant and, at the expiry of the term, instituted proceedings in the High Court of Hong Kong seeking a declaration that the bank was liable to return the deposit to the tenant. The master dismissed the application and his decision was upheld by the judge. The Court of Appeal of Hong Kong allowed the tenant's appeal holding that the obligation to return the deposit was an obligation which touched and concerned the land and so the burden of paying it passed to the bank with the reversion.

On the bank's appeal to the Judicial Committee:—

Held, allowing the appeal, that the obligations of the tenant to pay and of the landlord to return the deposit were merely personal obligations between the original parties to the lease; that in the absence of express assignment to their successors in title the right to the return of the deposit was enforceable only by the original tenant against the original landlord irrespective

of whether they had any interest in the land when the obligation to repay the deposit arose; and that, although the deposit was paid to secure the performance by the tenant of its obligations under the lease including those which touched and concerned the land, and the conditions for repayment of the deposit related to such performance, the landlord's covenant to return the deposit was not itself a covenant dealing with the subject matter of the lease or touching and concerning the land demised and so it did not pass with the reversion; and that, accordingly, the bank as assignee of the reversion was under no obligation to pay to the tenant the amount deposited with the original landlord (post, pp. 111B–E, 112E—113C).

In re Dollar Land Corporation Ltd. and Solomon (1963) 39 D.L.R. (2d) 221 applied.

Mansel v. Norton (1883) 22 Ch.D. 769, C.A.; *Lord Howard de Walden v. Barber* (1903) 19 T.L.R. 183 and *Moss' Empires Ltd. v. Olympia (Liverpool) Ltd.* [1939] A.C. 544, H.L.(E.) distinguished.

Decision of the Court of Appeal of Hong Kong reversed.

The following cases are referred to in the judgment of their Lordships:

Congleton Corporation v. Pattison (1808) 10 East 130
Dollar Land Corporation Ltd. and Solomon, In re (1963) 39 D.L.R. (2d) 221
Horsey Estate Ltd. v. Steiger [1899] 2 Q.B. 79, C.A.
Howard de Walden (Lord) v. Barber (1903) 19 T.L.R. 183
Hunter's Lease, In re [1942] Ch. 124; [1942] 1 All E.R. 27
Mansel v. Norton (1883) 22 Ch.D. 769, C.A.
Moss' Empires Ltd. v. Olympia (Liverpool) Ltd. [1939] A.C. 544; [1939] 3 All E.R. 460, H.L.(E.)
Thomas v. Hayward (1869) L.R. 4 Ex. 311

The following additional cases were cited in argument:

Bally v. Wells (1769) Wilm. 341
Boyer v. Warbey [1953] 1 Q.B. 234; [1952] 2 All E.R. 976, C.A.
Breams Property Investment Co. Ltd. v. Stroulger [1948] 2 K.B. 1; [1948] 1 All E.R. 758, C.A.
Distributors & Warehousing Ltd., In re (1985) 278 E.G. 1363
Hill v. Booth [1930] 1 K.B. 381, C.A.
Kumar v. Dunning (1986) 279 E.G. 223
Ockenden v. Henly (1858) El.Bl. & El. 485
Pinemain Ltd. v. Welbeck International Ltd. (1984) 272 E.G. 1168
Spencer's Case (1583) 5 Co.Rep. 16a
Woodall v. Clifton [1905] 2 Ch. 257, C.A.

APPEAL (No. 46 of 1985) with leave of the Court of Appeal of Hong Kong by the appellant bank, Hua Chiao Commercial Bank Ltd., from the judgment of the Court of Appeal of Hong Kong (Huggins V.-P., McMullin V.-P. and Cons J.A.) given on 18 April 1985 allowing an appeal by the respondent tenant, Chiaphua Industries Ltd. (formerly known as Chiap Hua Clocks & Watches Ltd.), against the order of Mayo J. in the High Court of Hong Kong made on 14 January 1985, whereby he dismissed the tenant's appeal from the order of Master Boa made on 19 September 1984 in the High Court dismissing the tenant's application for a declaration that the bank as a mortgagee in possession

A was liable to return to the tenant $277,896.80 being the rental deposit for certain premises.

The facts are stated in the judgment of their Lordships.

Michael Barnes Q.C. and *R. J. Furber* for the bank. The issue is whether an obligation to pay a sum of money contained in a lease binds B not only the original landlord but also a successor in title to the landlord.

In February 1982 the landlord mortgaged its interest in the reversion to the bank by way of assignment with provision for re-assignment on redemption. That form of mortgage is no longer permissible in Hong Kong by reason of the Conveyancing and Property Ordinance (Laws of Hong Kong, 1984 rev., c. 219), but the obligation to return this deposit C arose before that Ordinance came into force on 1 November 1984. The landlord went into liquidation after the bank had taken possession of the property, and so the tenant sought the return of the deposit from the bank.

The position in Hong Kong at the material time with regard to the passing of obligations in leases was the same as that in England prior to D the Law of Property Act 1925. At common law the burden of covenants entered into by a landlord did not pass to a successor in title to the landlord and so they could not be enforced against the successor in title. Section 2 of the Grantees of Reversions Act 1540 (32 Hen. 8, c. 34) provided that lessees should have the same remedy against the grantees of the reversions which they might have had against their grantors, and so the burden of covenants passed to successors in title to the original E landlord. The statute contained no requirement that the covenant had to be one which touched and concerned the land. By subsequent judicial interpretation of the statute, and in particular on the analogy of *Spencer's Case* (1583) 5 Co.Rep. 16a, which dealt with the passing of the benefit and burden of covenants upon an assignment of the leasehold interest, it became established that for the burden of a landlord's F covenant to pass the covenant had to be one which touched and concerned the land.

The provisions of section 2 of the Grantees of Reversions Act 1540 were replaced by section 11 of the Conveyancing Act 1881, which added the specific requirement that the covenant had to have reference to the subject matter of the lease for the benefit and burden of it to pass with the landlord's reversion. That has been held to have the same meaning G as touching and concerning the land. Section 11 of the Act of 1881 was replaced by section 142(1) of the Law of Property Act 1925. However, the Acts of 1881 and 1925 did not apply in Hong Kong, where the Grantees of Reversions Act 1540 as interpreted in England continued to apply until 1 November 1984, when it was replaced by sections 31 and 32 of the Conveyancing and Property Ordinance. However, there is really only one principle of law, namely that the burden of a covenant H made by a landlord in a lease passes to his successors in title provided that the covenant touches and concerns the land, and that principle is the same in Hong Kong under the Grantees of Reversions Act 1540 up to 1 November 1984 and since then under section 32(1) of the

Conveyancing and Property Ordinance, and in England today under section 142(1) of the Law of Property Act 1925.

As a matter of construction clause 4(h) of the lease requires the tenant to pay a sum to the landlord as a security deposit, and if at the expiration of the term there has been no breach of covenant by the tenant the deposit is to be returned but otherwise it is to be forfeited to the landlord. There are two aspects, namely the security deposit and the penalty. The landlord is entitled to retain the deposit until the end of the lease, but whether or not the landlord has to repay the deposit depends upon what claim, if any, for damages the landlord has against the tenant for breach of covenant. The arrangement relating to the security and the obligation to return the deposit are collateral matters which do not touch and concern the land, and therefore the contractual obligation to repay the sum deposited does not pass with the reversion.

If the tenant assigns his interest without making any arrangement with the assignee concerning the deposit, it will be repayable at the expiration of the lease to the original tenant, because the obligation to repay it is to the party who paid it. The same principle applies to the landlord, and it is the original landlord who has to make the repayment. The original landlord remains throughout the term contractually bound by the terms in the lease, and if he transfers his interest the benefits and burdens of his obligations under the lease only pass to the transferee if they touch and concern the land. If at the end of the lease there has been a breach of covenant by the tenant, the tenant will have no right to recover the deposit. The original landlord to whom it was paid can retain it while the assignee of the reversion will have a claim for damages for breach of covenant. The word "returned" in clause 4(h) shows that the deposit has to be repaid by the original landlord who received it to the original tenant who paid it. The words "forfeited to the landlord" mean that if there has been a breach of covenant by the tenant the deposit is forfeited to the original landlord.

With regard to covenants touching and concerning the land, see *Cheshire and Burn's Modern Law of Real Property,* 13th ed. (1982), p. 430. A security deposit is not something which affects the landlord in his normal capacity as landlord or the tenant in his normal capacity as tenant, and accordingly the obligations arising in relation to the deposit do not touch and concern the land.

Reliance is placed on *In re Dollar Land Corporation Ltd. and Solomon* (1963) 39 D.L.R. (2d) 221, which the Court of Appeal of Hong Kong declined to follow. The essential facts were identical to those in the present case. In *In re Dollar Land Corporation Ltd. and Solomon* two English cases were cited in support of the conclusion which Grant J. reached, namely *Hill v. Booth* [1930] 1 K.B. 381 and *In re Hunter's Lease* [1942] Ch. 124.

The Court of Appeal of Hong Kong regarded the security deposit as being connected with the tenant's covenants in the lease, and the Court of Appeal relied on *Lord Howard de Walden v. Barber* (1903) 19 T.L.R. 183. The purpose of the payment to the original landlord was to give the landlord some security and rights additional to those the landlord would ordinarily have if the tenant was in breach of covenant.

The more usual form of guarantee given to landlords is for them to take an express guarantee from a third party that the tenant's covenants will be observed. It has been uniformly held that the benefit of such guarantee does not pass to an assignee of the reversion: see *Pinemain Ltd. v. Welbeck International Ltd.* (1984) 272 E.G. 1168; *In re Distributors & Warehousing Ltd.* (1985) 278 E.G. 1363 and *Kumar v. Dunning* (1986) 279 E.G. 223.

If the decision of the Court of Appeal of Hong Kong is correct practical difficulties arise. If the covenant relating to the deposit is one which touches and concerns the land so that the burden passes to the landlord's successor in title, the benefit would pass to the tenant's successor in title, but it would be strange for the sum to be returned to him since he was not the one who had paid it. Furthermore, clause 4(h) requires the deposit to be "returned to the tenant," and it is not easy to see how a sum could be returned to someone who had not paid it. These considerations point strongly to the covenant being a personal matter between the original landlord and the original tenant.

Jonathan Sumption Q.C. for the tenant. There are two issues: (1) did the parties to the lease intend the assignee to be liable to repay the deposit? (2) if so, will the law give effect to their intentions?

As to (1) the effects of clause 4(h) is that if there is a relevant breach of contract the party concerned may forfeit the deposit. [Reference was made to *Ockenden v. Henly* (1858) El.Bl. & El. 485.]

The parties intended that the deposit should be retained by the landlord throughout the term and that it should be repaid only at the expiration of the lease. The lease contemplated the possibility of assignment, and by implication it cannot have been intended that the deposit should be repaid when assignment took place, because that would be inconsistent with the express words of the lease. The last part of the clause indicates that the person who has a right of action against the tenant for breach of covenant should be the same as the person to whom the deposit is forfeited. In almost every case after assignment of the reversion the original landlord will have no further interest in the performance of the covenants and no right of action against the tenant for breach of covenant, and so unless the breach occurred before the assignment the deposit is forfeited to the assignee and not the original landlord, and the assignee must repay it if there is no breach. There is no reason in principle why there should not be repayment of the deposit by an assignee to the tenant. It is open to the assignor and assignee to make specific arrangements as to repayment of the deposit.

It would be too heavy a burden to place on the word "returned" in clause 4(h) to hold that the deposit can only be repaid by the original landlord to the original tenant. The clause uses the terms "the landlord" and "the tenant," which are defined in the lease as including their assigns where the context so admits. Clause 4(h) is only saying that having been paid at the outset by the tenant to the landlord the deposit is to go back to whoever is the tenant when the lease expires. What is "returned" is not the same money but the equivalent sum by way of contingent debt, and so the word "returned" is inexact. The sum is not

held on any kind of trust but is the property of the recipient until the contingency occurs.

There would be practical difficulties if the Court of Appeal's decision is wrong, because it would mean that the beneficiary of forfeiture of the deposit at the end of the lease would be the original landlord who then had no interest in the performance of the tenant's covenants and could suffer no possible loss by their breach. If the tenant committed a breach of covenant and forfeited the deposit to the original landlord and the landlord's successor in title claimed damages for breach of covenant, he could not be required to give credit for the sum forfeited, and so the tenant would be paying twice on account of the same breach.

As to (2) where there are a number of covenants which touch and concern the land, and there is a promise by the landlord to pay money which is inextricably bound up with such covenants, that promise runs with the covenants which touch and concern the land. The obligation to repay the deposit is inextricably bound up with covenants which touch and concern the land.

The history of this particular rule of law shows that the law has always adopted an inclusive approach as to what covenants pass with the reversion, and looks to see if the particular covenant is incidental to the obligations of landlord and tenant. The Grantees of Reversions Act 1540 contained no limitation on the kinds of covenants which passed with the reversion. The purpose of the common law rule set out in *Spencer's Case,* 5 Co.Rep. 16a, was to prevent escape from the doctrine of privity of contract by tacking onto a lease something which did not properly belong to it.

Reliance is placed on *Bally v. Wells* (1769) Wilm. 341; *Woodall v. Clifton* [1905] 2 Ch. 257, *Breams Property Investment Co. Ltd. v. Stroulger* [1948] 26 K.B. 1 and *Cheshire and Burn's Modern Law of Real Property,* 13th ed., p. 431. The whole object of the security deposit was to induce performance of the tenant's covenants, and that must be by the tenant for the time being who in his capacity as tenant at the time must be entitled to the return of the deposit. The general principle is that a covenant runs with the land if it is incidental to the relationship of landlord and tenant, and the obligation to return the deposit is necessarily incidental to that relationship.

The other form of words used in the cases and referred to in *Cheshire and Burn's Modern Law of Real Property,* 13th ed., p. 431, is that no covenant which affects merely the person and not the nature, quality or value of the thing demised, or the mode of using or enjoying the thing demised, runs with the land. Any covenant which is related to the benefit the landlord will obtain from his land, or to the performance of the tenant's covenants which run with the land, affects the nature, quality or value of the thing demised. If the effect of the security deposit arrangement is to make it more likely that the tenant will perform covenants such as those concerning payment of rent or repair, it is incidental to the relationship of landlord and tenant, and it affects the nature, quality or value of the land and therefore runs with the land.

It has long been settled that a covenant to pay money which is not free-standing but which is bound up with covenants which touch and

A concern the land runs with them: see *Lord Howard de Walden v. Barber,* 19 T.L.R. 183; *Moss' Empires Ltd. v. Olympia (Liverpool) Ltd.* [1939] A.C. 544 and *Boyer v. Warbey* [1953] 1 Q.B. 234. Clause 4(h) cannot sensibly be operated in the way the parties intended unless in addition to the covenants which passed on assignment the obligation to return the deposit also passed. It is not accepted that the money has to be returned to the original tenant although he is most likely to have paid B it. Even in the absence of express assignment by the tenant to an assignee of the right to the return of the deposit the assignee is still entitled to it, but if that is incorrect the landlord's obligation to repay the deposit nevertheless passes with the reversion.

Hill v. Booth [1930] 1 K.B. 381 and *In re Hunter's Lease* [1942] Ch. 124 can be distinguished, and although *In re Dollar Land Corporation* C *and Solomon,* 39 D.L.R. (2d) 221, is not distinguishable on its facts it was not correctly decided and should not be followed.

There is no general rule of law that a promise by way of security cannot have reference to the subject matter of the lease or touch and concern the land. Cases concerning third parties giving security are necessarily different from those relating to landlords and tenants and their assigns, because such third parties have no interest at all in the D land.

Barnes Q.C. in reply. Where an obligation touches and concerns the land and so runs with it another obligation of the same party which is ancillary to it also runs with the land. Here the obligation to perform the covenants is an obligation of the tenant whereas it is the obligation of the landlord to return the deposit, and so the latter does not run with the land.

E The intention of the parties to be discerned from clause 4(h) is shown by the fact that the initial payment must be by the original tenant to the original landlord, and the subsequent words indicate that it is to be returned by the party who received it to the party who paid it or otherwise forfeited to the party who received it. Looking at the clause as a whole the conclusion is that it was intended that the original parties to F the lease should have the benefit and the burden of the obligations therein created.

If as a matter of construction the parties did intend that the obligation should pass to an assignee of the reversion effect cannot be given to that intention because the obligation to repay the deposit is not one which touches and concerns the land and does not pass with it.

G "Landlord" in clause 4(h) means the original landlord, and the provision for forfeiture of the deposit is to the original landlord and without prejudice to that landlord's right of action despite the fact that that may have no practical significance because the reversion has been assigned.

Cur. adv. vult.

H 25 November. The judgment of their Lordships was delivered by Lord Oliver of Aylmerton.

By a lease dated 29 March 1979 Fook Kin Enterprises Co. Ltd. ("Fook Kin") as landlord granted to the present respondent, Chiaphua Industries Ltd. (formerly known as Chiap Hua Clocks & Watches Ltd.),

as tenant a lease of certain premises in Hong Kong for a term of five years from 1 February 1979. It was provided in the lease that the expression "the landlord" "where the context so admits shall include its executors administrators and assigns" and that the expression "the tenant" "where the context so admits shall include its executors and administrators and assigns." The crucial provision of the lease for present purposes is clause 4(h). It provides:

> "The tenant shall pay to the landlord a sum of $277,896.80 as a security deposit on or before the signing of this lease. The deposit shall bear no interest and if there shall be no breach of any of the terms and conditions on the part of the tenant herein contained, the deposit shall be returned to the tenant at the expiration of the term of this lease or sooner determination of the same but shall if otherwise be absolutely forfeited to the landlord as liquidated damages without prejudice to the landlord's right of action against the tenant for any of its breaches thereof."

On 5 February 1982 Fook Kin mortgaged its interest in the reversion to Hua Chiao Commercial Bank Ltd. by way of assignment with provision for re-assignment on repayment of capital and interest. Nothing was expressed in relation to the security deposit. Following default by Fook Kin under the mortgage, on 15 January 1983 the bank took possession of the mortgaged property and took receipt of the rents and profits. Fook Kin subsequently went into liquidation and the bank remained in possession of the property.

The security deposit payable under clause 4(h)—which was equivalent to two months' rent under the lease—had been paid by the tenant to Fook Kin at the commencement of the lease. On 31 January 1984 the lease expired. The tenant was not then in breach of any of the terms and conditions of the lease nor was it suggested that it had been in such breach at any time before or after the assignment of the reversion to the bank.

The tenant issued an originating summons in the High Court of Hong Kong seeking a declaration that the bank was liable to return the deposit to the tenant. On 19 September 1984 Master Boa dismissed the claim and an appeal against that decision was dismissed by Mayo J. on 14 January 1985. However, on further appeal, the Court of Appeal in a judgment delivered on 18 April 1985 allowed the appeal and granted the declaration sought. It held that the obligation to return the security was one which touched and concerned the land and accordingly was an obligation the burden of which passed to and was binding on the bank. The bank now appeals.

There is a considerable measure of common ground between the parties. It is not in dispute that the bank constitutes, by assignment, "the landlord" for the purposes of the lease. Equally it is not in dispute that the test of whether the original landlord's covenant to return the amount of the deposit is enforceable against a successor in title is the same as it would be if the lease had been a lease of land in England, that is to say, whether the covenant is one "entered into by a lessor with reference to the subject matter of the lease" or, to use the common law

terminology, whether it is a covenant which "touches and concerns the land." Nor is there any disagreement about the formulation of the test for determining whether any given covenant touches or concerns the land. Their Lordships have been referred to and are content to adopt the following passage from *Cheshire and Burn's Modern Law of Real Property*, 13th ed. (1982), pp. 430–431:

> "If the covenant has direct reference to the land, if it lays down something which is to be done or is not to be done upon the land, or, and perhaps this is the clearest way of describing the test, if it affects the landlord in his normal capacity as landlord or the tenant in his normal capacity as tenant, it may be said to touch and concern the land.
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> "Lord Russell C.J. [in *Horsey Estate Ltd. v. Steiger* [1899] 2 Q.B. 79, 89] said: 'The true principle is that no covenant or condition which affects merely the person, and which does not affect the nature, quality, or value of the thing demised or the mode of using or enjoying the thing demised, runs with the land;' and Bayley J. at an earlier date asserted the same principle [in *Congleton Corporation v. Pattison* (1808) 10 East 130, 138]: 'In order to bind the assignee, the covenant must either affect the land itself during the term, such as those which regard the mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land at the end of the term.'
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> "If a simple test is desired for ascertaining into which category a covenant falls, it is suggested that the proper inquiry should be whether the covenant affects either the landlord qua landlord or the tenant qua tenant. A covenant may very well have reference to the land, but, unless it is reasonably incidental to the relation of landlord and tenant, it cannot be said to touch and concern the land so as to be capable of running therewith or with the reversion."

The two points upon which the parties divide are (a) whether as a matter purely of the construction of the clause it can be said to contemplate a payment by or to anyone other than the two original parties to the lease and (b) whether, assuming that the covenant is apt in its terms to impose an obligation between persons other than the two original parties, the obligation is one which, whatever the parties may have intended, touches and concerns the land so as to impose, through privity of estate, a financial obligation on a successor in title to "return" that which he has never had.

As regards the question of construction, the arguments are finely balanced. On any analysis the clause is, to say the least, infelicitously drawn. It seems tolerably clear that the parties can never have addressed themselves here specifically to the event of an assignment either of the reversion or of the lease even though clause 5 of the lease clearly shows that they entertained the possibility of the term being assigned. On the one hand, it can be said that the initial references to the tenant and the landlord can refer only to the original parties and that there is no necessary context for reading the subsequent references in the clause as

having any wider connotation, particularly having regard to the use of the word "return" which hardly seems appropriate to a payment by a person who has never received money to a person who has never paid it. On the other hand, where, as here, the reversion changes hands, there seems little sense, if the covenant is a purely personal one, in postponing repayment until the end of the lease. Moreover, as Mr. Sumption has forcefully pointed out, the reference to the "return" being without prejudice to the landlord's right of action appears to contemplate that the "landlord" obliged to return the payment will be the same person as the "landlord" having then the right of action for damages for breach of covenant. If it were otherwise, then the original tenant, if in breach of covenant, would be liable to an action for damages at the suit of the new landlord without any countervailing obligation on the new landlord to give credit for the deposit forfeited to the original landlord.

It is indeed doubtful whether it is possible to apply any totally rational construction to the clause without a wholesale implication of terms which the parties have not thought fit themselves to express. That in itself is not an easy exercise although it is not one from which their Lordships would or could shrink if it were necessary to make the attempt. But it is not, in the final analysis, necessary for their Lordships to express any concluded view on the proper construction of the clause, because there remains in any event the critical question of whether, even assuming that, as a matter of construction of the clause, there can be deduced the intention by the original parties that the benefit and burden of the landlord's obligation for payment should pass without express assignment or novation to and against successors in title, that is a result which, having regard to the nature and purpose of the obligation, is capable of achievement. And as regards this question, their Lordships have found themselves unable to agree with the decision reached by the Court of Appeal of Hong Kong.

In the High Court, Mayo J., in holding that the landlord's obligation to "return" the deposit was not one which ran with the reversion, relied upon the decision of Uthwatt J. in *In re Hunter's Lease* [1942] Ch. 124 and upon a decision of Grant J. in the Ontario High Court (*In re Dollar Land Corporation Ltd. and Solomon* (1963) 39 D.L.R. (2d) 221) where the relevant facts were substantially indistinguishable from those in the instant case. In the former, the original lessor had covenanted to pay to the lessee a sum of £500 upon the determination of the lease, but subject to a proviso that if he was unwilling to pay the covenanted sum the lessee would be entitled to remain in occupation and to call for a new lease for five years subject to the same conditions as to determination and as to payment of £500. The question raised by the originating summons was whether, the reversion having changed hands, the obligation to pay £500 on the determination of the lease was one which bound a transferee of the reversion. Although it was conceded that a bare covenant by the lessor to pay a sum of money on the determination of the term clearly did not touch and concern the land, it was argued that the obligation in that case was one which was part of an arrangement governing the continued occupation of the premises by the lessee and therefore passed to the transferee of the reversion. Uthwatt J. rejected

A that argument, quoting, at p. 129, from the judgment of Channell B. in *Thomas v. Hayward* (1869) L.R. 4 Ex. 311, 312:

> "A covenant runs with the land only when it touches, that is, when its operation directly, and not merely collaterally, affects the thing demised."

B In the Canadian authority relied on by Mayo J. the clause in question provided (so far as material), 39 D.L.R. (2d) 221, 222, that the lease was executed by the lessor upon condition that the lessee would forthwith deposit with the lessor a sum of $165 "in order to assure the performance by the lessee of all terms, conditions and provisions herein contained." It further provided:

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> "under no condition shall the lessee be entitled to ask for or demand the return or a rebate of any part or all of the said sum of $165 until the expiration of the period provided for in this lease . . . and then only if the lessee has fulfilled all the terms, conditions and provisions herein contained . . ."

Grant J., after an extensive review of the English authorities, at p. 226, concluded:

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> "It would appear from the cases above quoted that such an arrangement as is set forth in the guarantee clause of the lease . . . is a personal obligation only between the immediate landlord and his lessee. It is not such an arrangement as deals with 'the subject matter of the lease.' As Dollar Land received no part of the $165 paid by the tenant Solomon, I do not find any obligation on its part to now repay the same to Solomon."

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The Court of Appeal in Hong Kong declined to follow the Canadian authority, observing that although the cases cited to Grant J. did support the general proposition that a covenant by a party to a lease to pay a sum of money at the end of the term was personal to the original parties, he did not have (and nor did Mayo J. in the High Court) the benefit of the citation of the two English cases which put a gloss upon that general proposition. The first was *Mansel v. Norton* (1883) 22 Ch.D. 769, a decision of the Court of Appeal where the question which fell to be decided was whether the responsibility for the performance of a covenant in the lease of a farm for the purchase by the lessor of the lessee's tenant-right at valuation on the expiration of the term fell upon the landlord's estate or upon the devisee under his will who had entered into possession. It was held that the landlord's covenant was one which passed with the reversion and that the burden therefore fell upon the devisee in possession. The second case relied upon by the Court of Appeal in the instant case was a decision of Wright J. in *Lord Howard de Walden v. Barber* (1903) 19 T.L.R. 183 which was concerned with a tenant's covenant not to do or suffer anything which should be, or tend, to the annoyance, nuisance or damage of the person or persons for the time being entitled in reversion. The lease contained a specific provision that if the premises should at any time during the term be used as a brothel or disorderly house the tenant should pay to the landlord a sum

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of £800 by way of liquidated damages. The question in issue was whether an assignee of the term who had permitted the premises to be used as a brothel was liable to pay the sum of £800. The judgment is reported shortly and only in oratio obliqua. Wright J. observed, at p. 184:

> "It was a strong thing to hold that a covenant to pay damages could run with the land. It seemed to him that the only way to regard it was that the covenant was inserted for the express purpose of binding the assignee. It was not a separate provision, but an annexe to the general covenant. If it was treated as a buttress to the general covenant there was no objection to treating it as running with the land . . ."

There is, of course, no doubt that the mere fact that a covenant, whether on the part of the landlord or of a tenant, involves an obligation to pay a liquidated sum of money does not of itself demonstrate that the covenant is not one which touches and concerns the land but, with respect to the Court of Appeal, their Lordships do not find either of these two cases of great assistance in the solution of the question raised by this appeal. The covenant in *Mansel v. Norton*, 22 Ch.D. 769, was, as both Jessel M.R. and Lindley L.J. observed, a covenant to purchase the tenant-right or cultivation. In his judgment Jessel M.R. said, at pp. 771–772:

> "Before the present state of agricultural depression a new tenant could always be found who came in and paid the outgoing tenant, and the landlord was not called upon to pay. The landlord, however, was the person liable to the outgoing tenant, and in the view of the law he paid the outgoing tenant and received the amount back from the incoming tenant."

The liability, he observed, at p. 772, was "a liability in respect of the cultivation of the land." As such it was plainly a covenant which directly affected the value and quality of the land. Similarly, in *Lord Howard de Walden v. Barber*, 19 T.L.R. 183, the liability to pay damages for breach of the covenant not to cause damage to the reversion was clearly and on any analysis a covenant which touched and concerned the land. The covenant to pay a liquidated sum for a breach of a particular nature was no more than the quantification of the damage and was, quoad that particular type of breach, not so much a buttress for the covenant but part and parcel of the covenant itself.

The tenant argues, however, that inasmuch as the tenant's obligation to pay over the deposit on the execution of the lease was an obligation to secure the performance of covenants which touched and concerned the land, it was an obligation inextricably associated with covenants whose benefit and burden would pass with the reversion in the lease respectively. The landlord's obligation to repay if those covenants are observed is, it is argued, inseparable from that associated obligation and must therefore possess the same characteristics as the covenants whose performance is secured by the associated obligation. To put it another way the obligation to deposit is an obligation of the tenant assumed by

him qua tenant and it follows that the correlative obligation of the landlord is an obligation assumed by him qua landlord. This argument is reflected in the judgment of McMullin V.-P. in the Court of Appeal, who observed:

> "The plain fact is that the provisions of clause 4(h) are so clearly intended to encourage compliance with the very many covenants enjoining the lessee to make proper use of the land and not to cause a diminution in its value that it would be wholly unrealistic to regard it as being otherwise than inextricably bound up with those undertakings generally."

That the original tenant's obligation to make the deposit is "bound up" with his obligation to perform the tenant's covenants in the lease is undeniable, but the former is, of course, a once-for-all contractual obligation between the original parties as regards which no question of transfer with the term or with the reversion can arise. The sum deposited is to be paid on or before the execution of the lease. What this appeal is concerned with, however, is only the landlord's obligation to repay once the lease has expired without breach of covenant, there being neither any obligation on the original landlord to pay over the amount of the deposit to an assignee of the reversion nor any obligation on the original tenant to assign to an assignee of the term his contractual right to receive back the amount of the deposit when and if the condition for its repayment is fulfilled. It is bound up with the tenant's covenant only, as it were, at one remove, as being an obligation correlative to a contractual obligation which is itself connected with the performance of covenants touching and concerning the land. The expression "inextricably bound" appears to derive from the speech of Lord Atkin in *Moss' Empires Ltd. v. Olympia (Liverpool) Ltd.* [1939] A.C. 544, a case strongly relied upon by the tenant. The question in that case arose out of a lease which contained a series of repairing and decorating covenants on the part of the tenant numbered (iv) to (viii) inclusive. The covenant numbered (vii) obliged the tenant in each year of the term to expend at least £500 upon the performance of the covenants to repair and decorate for which receipts were to be produced to the lessor, any shortfall in any year in the amount expended to be paid to the lessor and any excess in expenditure over the amount of £500 in any year to be treated pro tanto as a satisfaction of the liability for future years. An assignee of the lease having failed to expend the full sum of £500 in certain years, the question arose whether the obligation was one which bound the assignee as one touching and concerning the land or whether it was merely a collateral covenant binding only as between the original parties. Lord Atkin observed, at p. 551:

> "this is not a bare obligation to pay money which does not touch the thing demised. On the contrary, the performance of the repairing covenants and the obligations under clause vii are so inextricably bound together that it would be impossible to sever clause vii, and treat it as a collateral promise to pay money. The relevant clauses read as a whole provide a scheme whereby if things work smoothly the obligation of the tenant over the term is limited

> to £500 a year, less than one-sixth of the total rent, while the lessor is provided with sums which, if he chooses, he may apply towards meeting the obligation which he has assumed of performing structural repairs. In my opinion the clause in question closely touches the thing demised, and runs with the land."

Similarly Lord Porter said, at p. 560:

> "This is not a bare or mere covenant to pay £500 or even to pay the difference between the sum spent and proved and £500. It is part of a number of covenants whereby the mutual obligations of landlord and tenant in repairing and redecorating the premises are fulfilled and is inextricably bound up with them."

On the facts of that case the decision is scarcely a surprising one, for the obligation was to expend not less than the stipulated sum upon the preservation of the estate in the proper performance of the repairing covenants in the lease, an obligation clearly affecting the value of the lessor's estate and so directly touching and concerning the thing demised. That was, however, a very different case from the present and their Lordships are not persuaded that it is, or was ever intended to be, authority for the proposition that every covenant which is related, however obliquely, to some other obligation which touches and concerns the land necessarily takes on from that very relationship, the same character as regards transmissibility to or against successors in title. To say that the obligation to "return" the amount of the deposit is "inextricably bound up with" covenants which touch and concern the land in the sense in which the expression was used by McMullin V.-P. in the instant case—i.e. that, in order to determine whether or not the obligation to pay could have arisen against anyone, it would be necessary to survey the other covenants—does not, in their Lordships' view, answer the critical question of whether it itself touches and concerns the land. It certainly does not per se affect the nature quality or value of the land either during or at the end of the term. It does not per se affect the mode of using or enjoying that which is demised. And to ask whether it affects the landlord qua landlord or the tenant qua tenant is an exercise which begs the question. It does so only if it runs with the reversion or with the land respectively. There is not, on any conceivable construction of the clause, anything which either divests the original tenant of his contractual right to receive back after assignment the deposit which he has paid or which entitles an assignee from him to claim the benefit of the sum to the exclusion of his assignor; and, plainly, the money cannot be repaid more than once. Equally, there is not on any conceivable construction anything in the clause which entitles the assignee of the reversion to take over from his assignor the benefit of the sum deposited or which obliges the assignee, in enforcing the covenants against the tenant for the time being, to give credit for money which he himself has never received and to which he has no claim. Whilst it is true that the deposit is paid to the original payee because it is security for the performance of contractual obligations assumed throughout the term by the payer and because the payee is the party with whom the contract is entered into, it is, in their Lordships' view, more realistic to regard the

obligation as one entered into with the landlord qua payee rather than qua landlord. By demanding and receiving this security, he assumes the obligation of any mortgagee to repay on the stipulated condition and that obligation remains, as between himself and the original payer, throughout the period of the lease, even though neither party may, when the condition is fulfilled, have any further interest in the land demised. The nature of the obligation is simply that of an obligation to repay money which has been received and it is neither necessary nor logical, simply because the conditions of repayment relate to the performance of covenants in a lease, that the transfer of the reversion should create in the transferee an additional and co-extensive obligation to pay money which he has never received and in which he never had any interest or that the assignment of the term should vest in the assignee the right to receive a sum which he has never paid.

Their Lordships consider that *In re Dollar Land Corporation Ltd. and Solomon*, 39 D.L.R. (2d) 221, was rightly decided. In all material respects it is indistinguishable from the instant case. They will accordingly humbly advise Her Majesty that the appeal should be allowed and that the order of Mayo J. in the High Court dismissing the tenant's action with costs should be restored. The tenant must pay the bank's costs before their Lordships' Board and in the Court of Appeal.

Solicitors: Clifford-Turner; Turner Kenneth Brown.

S. S.

[PRIVY COUNCIL]

ATTORNEY-GENERAL OF HONG KONG AND ANOTHER . . . . . APPELLANTS

AND

HUMPHREYS ESTATE (QUEEN'S GARDENS) LTD. RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1986 Nov. 24, 25; Dec. 11

Lord Keith of Kinkel, Lord Templeman, Lord Oliver of Aylmerton, Lord Goff of Chieveley and Sir Ivor Richardson

Estoppel—Conduct, by—Equitable—Agreement in principle between government and group of companies for exchange of property—Agreement "subject to contract"—Parties substantially performing agreement—Formal documents not executed—Whether group estopped from withdrawing from agreement

The defendants, as representatives of the government of Hong Kong, and a group of companies, which included the plaintiff company, entered into negotiations for the government to acquire 83 flats in premises owned by the group in exchange for the grant of a Crown lease of government property to the group with the right to develop it and the group's adjoining property. In January 1981 an agreement in principle was reached "subject to contract" and providing that the terms could be varied or withdrawn and that any agreement was subject to the necessary documents, giving legal effect to the transaction, being executed and registered. The group permitted the government to take possession of the flats. After spending money on them, the government had, by August 1981, moved senior civil servants into the flats, and disposed of the residences they formerly occupied. Although a draft licence was prepared giving the group the right to terminate the government's occupation of the flats, it was never executed. However, the government granted the group a licence, expressed to be revocable at any time without notice, to enter its property and allowed the group to demolish the existing buildings in preparation for redevelopment. By August 1982 the group had paid the government $103,865,608, being the agreed difference in value between the two properties, and the basic terms of the agreement in principle had been agreed and had been substantially performed. The requisite documents were drafted but they were not executed because in April 1984 the group decided to withdraw from the negotiations and the plaintiff gave notice to the government determining its licence to occupy the flats. On an action by the plaintiff against the defendants in the High Court the judge ordered, inter alia, that the first defendant should pay $103,865,608 to the plaintiff and that the plaintiff was entitled to possession of the flats, and he dismissed the defendants' counterclaim holding that the plaintiff was not estopped from requiring the government to deliver up possession. The Court of Appeal of Hong Kong dismissed the defendants' appeal.

On the defendants' appeal to the Judicial Committee:—

Held, dismissing the appeal, that for the group to be estopped from withdrawing from the agreement in principle the government had to establish that it had taken possession of the flats and had spent money on them under an expectation or belief created or encouraged by the group that the group would carry out the agreement and transfer the flats to the government; but that since the evidence plainly showed that the group to the government's knowledge had retained the right to resile from the agreement, the government had failed to prove that the group had created or encouraged the government to expect that there would be no withdrawal by the group, or that the government had relied on such expectation; that, accordingly, although the government had acted to its detriment, in the circumstances, it being neither unfair nor unjust nor unconscionable for the group to refuse to proceed, no estoppel operated to prevent the group from exercising its legal right to refuse to execute the documents and to withdraw from the transaction (post, pp. 124B–D, F—125B, 126A, 127G–H).

Salvation Army Trustee Co. Ltd. v. West Yorkshire Metropolitan County Council (1980) 41 P. & C.R. 179 distinguished.

Per curiam. It is possible but unlikely that in circumstances at present unforeseen a party to negotiations set out in a document expressed to be "subject to contract" would be able to satisfy the court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document (post, pp. 127H—128A).

Decision of the Court of Appeal of Hong Kong affirmed.

The following cases are referred to in the judgment of their Lordships:

Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] Q.B. 84; [1981] 2 W.L.R. 554; [1981] 1 All E.R. 923; [1982] Q.B. 84; [1981] 3 W.L.R. 565; [1981] 3 All E.R. 577, C.A.

Crabb v. Arun District Council [1976] Ch. 179; [1975] 3 W.L.R. 847; [1975] 3 All E.R. 865, C.A.

Habib Bank Ltd. v. Habib Bank A.G. Zurich [1981] 1 W.L.R. 1265; [1981] 2 All E.R. 650, C.A.

Holiday Inns Inc. v. Broadhead (1974) 232 E.G. 951

Inwards v. Baker [1965] 2 Q.B. 29; [1965] 2 W.L.R. 212; [1965] 1 All E.R. 446, C.A.

Laird v. Birkenhead Railway Co. (1859) Johns. 500

Ramsden v. Dyson (1866) L.R. 1 H.L. 129, H.L.(E.)

Salvation Army Trustee Co. Ltd. v. West Yorkshire Metropolitan County Council (1980) 41 P. & C.R. 179

Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. (Note) [1982] Q.B. 133; [1981] 2 W.L.R. 576; [1981] 1 All E.R. 897

Willmott v. Barber (1880) 15 Ch.D. 96

The following additional cases were cited in argument:

Birmingham and District Land Co. v. London and North Western Railway Co. (1888) 40 Ch.D. 268, C.A.

Gregory v. Mighell (1811) 18 Ves.Jun. 328

Plimmer v. Mayor of Wellington (1884) 9 App.Cas. 699, P.C.

APPEAL (No. 26 of 1986) with leave of the Court of Appeal of Hong Kong by the defendants, the Attorney-General of Hong Kong and the Colonial Treasurer Incorporated, from the judgment and order of the Court of Appeal of Hong Kong (Li V.-P., Yang and Fuad JJ.A.) given on 31 January 1986 dismissing an appeal by the defendants from the judgment of Jackson-Lipkin J. on 10 May 1985 whereby the first defendant was ordered to pay to the plaintiff, Humphreys Estate (Queen's Gardens) Ltd., $103,865,608 and it was declared that the plaintiff was entitled as against the second defendant to possession of the 83 Tregunter flats.

The facts are stated in the judgment of their Lordships.

Andrew Morritt Q.C. and *David Fleming,* Senior Crown Counsel, Hong Kong, for the defendants. The judge and the Court of Appeal erred in concluding that since the negotiations between the parties were expressed to be "subject to contract" equitable principles of estoppel could not operate.

If there is an enforceable contract there is no need to resort to the principles of estoppel. Conversely, it is in those circumstances where there is no contract that the conduct of one party or the other may be unconscionable so as to give rise to the application of the principles of estoppel. There is no reason why the principles of estoppel should be applicable when the absence of an enforceable contract is due to one reason rather than to another. For instance, if there is no written memorandum of a contract for the sale of land the equitable doctrine of part performance may apply. The authorities show that the principles of estoppel have been applied even though there has been no agreement at all, and it is wrong to take the view that they cannot apply here.

If the agreement is actually performed it does not follow that equitable principles cannot apply to prevent one party resiling from it merely because the documents are marked "subject to contract." Equitable principles can apply where there is not an enforceable contract for whatever reason. The fact that an agreement is subject to contract is not conclusive that there is no estoppel, but only one of the factors to be taken into account in deciding whether or not estoppel arises. The test is whether in all the circumstances it is unconscionable for one party to act in a particular way.

The defendants rely on the type of estoppel enunciated by Lord Kingsdown in *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129, 170. HKL created or encouraged the government to expect that HKL would transfer the Tregunter flats to the government, under the expectation the government took possession of the flats and spent money on them to HKL's knowledge, and so equity will compel HKL to give effect to that expectation. There must come a time when in view of what is done by one party the other party cannot say that it will not complete the transaction.

With regard to the application of the equitable principles of estoppel, reliance is placed upon *Gregory v. Mighell* (1811) 18 Ves.Jun. 328; *Ramsden v. Dyson,* L.R. 1 H.L. 129; *Laird v. Birkenhead Railway Co.* (1859) Johns. 500; *Plimmer v. Mayor of Wellington* (1884) 9 App.Cas.

699; *Inwards v. Baker* [1965] 2 Q.B. 29; *Crabb v. Arun District Council* [1976] Ch. 179 and *Salvation Army Trustee Co. Ltd. v. West Yorkshire Metropolitan County Council* (1980) 41 P. & C.R. 179. In the latter case specific performance of an agreement "subject to contract" was ordered.

The courts have said that the categorisation of estoppel is unsatisfactory, and the question now is whether in the circumstances of the particular case it is unconscionable for one party to rely on its strict legal rights or to seek to take advantage of a mistake which all parties shared. [Reference was made to *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. (Note)* [1982] Q.B. 133, *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84 and *Habib Bank Ltd. v. Habib Bank A.G. Zurich* [1981] 1 W.L.R. 1265.]

The question therefore is whether it would be unconscionable for HKL to be permitted to deny that which it knowingly or unknowingly encouraged the government to assume, namely that HKL would take a Crown lease of Queen's Gardens in exchange for the assignment of the Tregunter flats to the government in accordance with the agreement in principle.

Pursuant to that agreement the government made arrangements for senior civil servants to occupy the Tregunter flats, by the end of August 1981 they had been accommodated there, and their former residences were disposed of. The government spent money on the flats. According to the evidence of Mr. Ward, who was one of the government officials concerned with the negotiations, he thought that the point of no return had been reached when the government took over the first of the Tregunter flats. The giving and taking of possession of the flats were regarded by both HKL and the government as performance of one of the terms of the agreement in principle, and were done in the hope that the whole transaction would be carried out.

The point of no return started when the government took possession of the first Tregunter flat on 26 June 1981 and ended in 1982 when the government had done all it was required to do under the agreement in principle. From 26 June 1981 onwards every act of each party in performance of the agreement encouraged the other party to expect that the agreement would be duly completed, and so they are estopped from withdrawing from the agreement. The earlier statements that the negotiations were "subject to contract" were overtaken by events. HKL encouraged the government to believe that the agreement would be implemented, and so it is estopped from resiling from the transaction because the government acted to its detriment in that belief. In all the circumstances it would be unconscionable for HKL to withdraw. Total agreement between the parties is not necessary, and if an estoppel arises the court can give effect to the agreement in principle as it thinks fit.

The circumstances in which the Queen's Gardens licence was granted show that both sides treated the agreement in principle as something which had to be performed. Although the draft licence relating to the Tregunter flats and the licence relating to Queen's Gardens contained powers of revocation, the government and HKL regarded the giving and taking of possession of both properties as being acts done in performance

of the agreement in principle. Every act done by one party encouraged the belief in the other that the agreement would be fulfilled, and actions were done in reliance on such a belief. A

The following actions by the government show that it acted to its detriment and so if the other requirements of estoppel exist HKL is not entitled to withdraw from the transaction: (1) Senior civil servants were transferred to the Tregunter flats and their former residences were demolished, and the government paid for additional amenities in the flats. (2) The demolition of existing buildings on the Queen's Gardens site involved resiting the utilities. (3) The government relocated Glenealy Junior School. (4) The negotiations entered into by the government with the Ladies Recreation Club concerning land belonging to the club needed by HKL to facilitate the redevelopment of Queen's Gardens, and the execution of tenancy and surrender agreements by the club in June 1982. B C

Everything done by HKL from January 1981 shows that they thought that they were committed to the transaction, and the Board should sanction what both parties clearly thought to be the position. By April 1984 when HKL purported to revoke the government's licence to occupy the Tregunter flats the only point of substance in the agreement in principle not yet agreed was the length of the building covenant. If the appeal is allowed the Board should order specific performance of the conditions of exchange because in appropriate circumstances the court has power to make such an order: see *Snell's Principles of Equity,* 28th ed. (1982), p. 563. D

From 26 June 1981, when the government took possession of the first of the Tregunter flats, every act by HKL in performance of the agreement in principle served to create or encourage the belief in the government that the exchange would duly take place, or that HKL would not insist on their strict legal rights, and every act of the government was done in pursuance of that belief so encouraged or created. The encouragement by HKL was handing over the first of the Tregunter flats and the others untroubled by the non-existence of a licence; HKL agreeing the premium for the hand over of the flats, which was paid in accordance with the agreement in principle, and seeking a reduction in the premium by reason of the late hand over of Queen's Gardens showing HKL's recognition that the agreement in principle was being performed; HKL taking possession of Queen's Gardens, demolishing existing buildings, and taking early possession of Glenealy Junior School paying the premium resulting from that in performance of the agreement in principle; and HKL continuing until July 1983 to discuss the terms of the conveyancing documents and plans relating to Queen's Gardens. E F G

The government so encouraged took possession of the Tregunter flats; spent a substantial sum on extra fittings for them; transferred senior civil servants from other properties to the flats; relocated services or arranged for their relocation so that demolition work could be carried out on Queen's Gardens by HKL; at the end of 1981 the government disposed of its properties in Peak Rd., the Albany and Mount Kellett Rd.; the government relocated Glenealy Junior School and entered into H

A transactions with the Ladies Recreation Club; and up to July 1983 the government continued to deal with HKL. Each of those acts by the government was done to the knowledge of HKL. Throughout the entire period both parties recognised the agreement in principle to be the necessary starting point of the grand design, and it was not until the change of heart by HKL in July 1983 that there was any question of renegotiating basic terms. In those circumstances it was unconscionable B for HKL to seek to resile from the agreement in principle having regard to all that had been done by both parties pursuant to it.

The agreement in principle was perfectly clear and there was an equally clear representation by HKL by conduct that the agreement would be performed. Although the draft Tregunter licence and the Queen's Gardens licence were each stated to be revocable, the parties C acted throughout as if the agreement would be performed.

If the defendants' main argument is not accepted the subsidiary question which arises is whether HKL are entitled to revoke the Tregunter licence notwithstanding the dealings between the parties after the grant of the licence. It would be inequitable in the light of those dealings for HKL to be allowed to revoke the licence, and reliance is placed upon *Birmingham and District Land Co. v. London and North* D *Western Railway Co.* (1888) 40 Ch.D. 268.

The government is in possession of the flats either under a licence at will revocable on reasonable notice, or a licence on the terms of the draft licence, which provided that the licensor might terminate the licence and resume possession if the grant was not made within three months. The period was subsequently extended to six months, and so E the right to revoke arose in February 1982. However, for over a year thereafter HKL continued to implement the agreement in principle and the acts to which reference has been made were done by the government. Accordingly HKL by their conduct induced the government to believe that they would not enforce their right to revoke the licence and, since the parties cannot be placed in the same position as they were in before, HKL is estopped from revoking the licence.

F *Robert Alexander Q.C., Charles Purle* and *Robert Ribeiro* (of the Hong Kong Bar) for the plaintiff were not called upon to make submissions.

Cur. adv. vult.

G 11 December. The judgment of their Lordships was delivered by Lord Templeman.

Between April 1979 and April 1984, the defendants representing the Hong Kong government negotiated with the Hong Kong Land Co. Group ("HKL"), which includes the plaintiff company, for an exchange whereby the government would acquire 83 flats, forming part of the Tregunter property belonging to HKL, and in exchange HKL would H take from the government a Crown lease of property known as Queen's Gardens and be granted the right to develop Queen's Gardens and certain adjoining property already held by HKL. It is common ground that the negotiations did not result in a contract. The exchange of the

Tregunter and Queen's Gardens properties was agreed in principle but subject to contract in January 1981. The government contend that in the events which happened between June 1981 and August 1982 both parties became estopped from refusing to give effect to the agreement in principle. HKL purported to withdraw from the negotiations in April 1984. By that time both parties had sufficiently indicated their intentions with regard to the details of the exchange to enable the court to make an order which would ensure that the agreement in principle was carried into effect on terms acceptable to both parties if the agreement in principle had become binding by estoppel. The question is whether HKL were entitled to withdraw from the negotiations in April 1984. The trial judge, Jackson-Lipkin J., found in favour of HKL and his decision was upheld by the Court of Appeal of Hong Kong (Li V.-P., Yang and Fuad JJ.A.). The government now appeal to Her Majesty in Council.

The agreement in principle was set forth in detail in an offer letter from the government dated 12 January 1981 and an acceptance letter from HKL dated 13 January 1981. A major part of this agreement, as subsequently modified and expanded, was carried out. In particular the government took possession of the Tregunter flats and fitted them out, and moved in senior civil servants to that accommodation by August 1981. The government disposed of the residences formerly occupied by those servants. HKL took possession of Queen's Gardens by November 1981 and demolished the existing buildings on the Queen's Gardens and adjoining sites by May 1982 with a view to redevelopment. HKL paid to the government by August 1982 the full sum of $103,865,608, the agreed difference between the value of the Tregunter premises and the value of Queen's Gardens. There remained to be solved various minor problems, some of which were envisaged in the agreement in principle and some of which arose thereafter. There also remained to be agreed and executed documents which would transfer the Tregunter premises to the government and which would vest in HKL a Crown lease of Queen's Gardens. These documents would define the rights and obligations of the government as part owners of Tregunter and the rights and obligations of HKL as lessees of Queen's Gardens and as developers. By February 1984 all these problems had been solved with trivial exceptions of no importance. By February 1984 also, the necessary documents had been drafted and agreed, again with trivial exceptions of no importance. By February 1984 there was no difficulty in the court devising an order for specific performance of the agreement in principle provided that the agreement had become binding by estoppel.

The agreement in principle was not binding in its inception. The letter dated 12 January 1981 containing the government's offer was marked "without prejudice." The writer of the letter was "pleased to inform" HKL that "subject to contract, government have agreed in principle" to grant Queen's Gardens to HKL in exchange for the Tregunter flats. After setting out the "basic terms" in some detail, the letter continued:

> "I must, however, point out that the above basic terms may be varied or withdrawn prior to formal execution of the transaction. Furthermore, any agreement reached shall be subject to formal

A approval by the government and until the document or documents necessary to give legal effect to this transaction are executed and registered, this letter should not be considered as binding the government in any way."

Thus the author prudently gave emphasis to the principle that an agreement which is "subject to contract" has no binding force. The B government were fully aware and intended that either party could at any time and without any reason withdraw from the agreement in principle.

Mr. Morritt, who appeared for the government, submitted that every action of the government and every action of HKL after the date of the agreement in principle served to create or encourage a belief in the government that the agreement in principle would be carried into effect. The actions taken by the government in that belief were admittedly and C seriously detrimental in a way which could not be remedied. The civil servants cannot be returned to their former residences and the buildings on Queen's Gardens and elsewhere which were demolished cannot be restored. In these circumstances Mr. Morritt submitted that by August 1982 it was unconscionable for HKL to withdraw from the agreement in principle and they were estopped from so doing.

D The authorities expound and illustrate the principle upon which a litigant who is led to believe that he will be granted an interest in land and who acts to his detriment in that belief is enabled to obtain that interest.

From *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129 the statement of principle enunciated by Lord Kingsdown in his dissenting judgment has E received judicial approval and extension. Lord Kingsdown said, at p. 170:

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, F with the knowledge of the landlord, and without obligation by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."

In the present case, Mr. Morritt submits that HKL created or encouraged the government in the expectation that HKL would transfer the G Tregunter flats to the government. Under that expectation, the government took possession of the flats and spent money on them to the knowledge of HKL. Therefore equity will compel HKL to fulfil the government's expectation.

In *Laird v. Birkenhead Railway Co.* (1859) Johns. 500, the plaintiff applied to construct and use a private branch line connecting with the mainline of the defendant railway company. Page Wood V.-C. found, at H p. 513, that there was an agreement

> "indefinite in a certain sense, but still an agreement, that the plaintiff should be allowed to join their railroad on reasonable terms, which were to be afterwards settled."

The railway company allowed the plaintiff to construct and use the branch line paying agreed tolls; a draft agreement dealing with all the details of user was agreed in principle but not in fact signed. The railway company then gave notice to the plaintiff to take up the branch line. Page Wood V.-C. continued, at p. 513:

> "Did the company allow the plaintiff to expend his money on the faith that he would be permitted to join their line on reasonable terms? Certainly they did. Then is there any difficulty in saying what are reasonable terms? None whatever; . . ."

In the present case, Mr. Morritt submits that HKL allowed the government to expend money on the faith that they would be granted the Tregunter flats.

In *Inwards v. Baker* [1965] 2 Q.B. 29 where a father invited his son to build a house on the father's land, it was held that the son was entitled to live in the house as long as he wished. Lord Denning M.R. said, at pp. 36–37:

> "if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. . . . All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there."

Danckwerts L.J. said, at p. 38:

> "this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

So here, says Mr. Morritt, the government were allowed to expend money on Tregunter under an expectation created or encouraged by HKL that the agreement in principle would be carried into effect.

In *Holiday Inns Inc. v. Broadhead* (1974) 232 E.G. 951, 1087, Robert Goff J. summarised the position as follows:

> "the authorities clearly establish that there is a head of equity under which relief will be given where the owner of property seeks to take an unconscionable advantage of another by allowing or encouraging him to spend money, whether or not on the owner's property, in the belief, known to the owner, that the person expending the money will enjoy some right or benefit over the owner's property which the owner then denies him. . . . The authorities also establish . . . that this relief can be granted although the agreement or understanding between the parties was not sufficiently certain to be enforceable as a contract, and that the court has a wide, albeit of course judicial, discretion to what extent relief should be given and what form it should take."

In *Crabb v. Arun District Council* [1976] Ch. 179 the plaintiff sold part of his land without reserving a right of way for the retained part because he had been led to believe by a representative of the district council that they would allow him to construct and use an alternative access over their land. The plaintiff constructed and used the alternative access and the district council then tried to prevent him so doing. Lord Denning M.R. said, at p. 188, that if a person:

> "by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights—knowing or intending that the other will act on that belief—and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied."

Here, says Mr. Morritt, at the very least HKL are not entitled to insist on their strict legal right to claim possession of the Tregunter flats from the government.

Scarman L.J. in the same case, at p. 194, accepted the formulation of Lord Kingsdown in *Ramsden v. Dyson,* L.R. 1 H.L. 129, 170, referred with approval to the judgment of Fry J. in *Willmott v. Barber* (1880) 15 Ch.D. 96, deprecated the distinction between proprietary and promissory estoppel and stated, at p. 195, that equity would interfere if:

> "it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff."

He concluded that the district council, as possessors of the legal right, encouraged the plaintiff in the expenditure of money or in the other acts which he had done, either directly or by abstaining from asserting their legal rights, and that therefore the plaintiff was entitled to a perpetual use of the alternative access.

In *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. (Note)* [1982] Q.B. 133, Oliver J. reviewed all the authorities and in language to which he adhered in the Court of Appeal in *Habib Bank Ltd. v. Habib Bank A.G. Zurich* [1981] 1 W.L.R. 1265, 1285, concluded, at p. 151:

> "the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson*, L.R. 1 H.L. principle—whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial—requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

Mr. Morritt said it would be unconscionable for HKL to be permitted to deny that which HKL allowed or encouraged the government to assume to their detriment, namely that the agreement in principle would be carried into effect.

Finally in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84, 122, Lord Denning M.R. reduced the doctrine of estoppel:

> "into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so."

Mr. Morritt says that the government and HKL proceeded on the basis of the underlying assumption that the agreement in principle would be carried into effect and that it would be unfair or unjust to allow HKL to go back on that assumption.

Their Lordships accept that the government acted to their detriment and to the knowledge of HKL in the hope that HKL would not withdraw from the agreement in principle. But in order to found an estoppel the government must go further. First the government must show that HKL created or encouraged a belief or expectation on the part of the government that HKL would not withdraw from the agreement in principle. Secondly the government must show that the government relied on that belief or expectation. Their Lordships agree with the courts of Hong Kong that the government fail on both counts.

Mr. Morritt submitted that every action of the government and every action of HKL after the date of the agreement in principle served to create or encourage a belief and expectation in the government that the agreement in principle would be carried into effect and that HKL would not withdraw. HKL allowed the government to take possession of Tregunter, to fit out the flats, to re-house senior civil servants and to dispose of their former residences. HKL prevailed on the government to allow HKL to enter upon and to destroy the buildings comprised in Queen's Gardens and adjacent sites and HKL paid in full the price for taking over Queen's Gardens. It was impossible for the government to go back and unthinkable that HKL would not go forward. It was unconscionable for HKL to seek to exercise their legal right to withdraw from the agreement in principle.

Their Lordships accept that there is no doubt that the government acted in the confident and not unreasonable hope that the agreement in principle would come into effect. As time passed and more and more actions were undertaken in conformity with the proposals contained in the agreement in principle, the government's hopes were strengthened. It became more and more unlikely that either the government or HKL would have a change of heart and would withdraw from the agreement in principle. But at no time did HKL indicate expressly or by implication that they had surrendered their right to change their mind and to withdraw. That right, expressly reserved and conferred by the government, was to withdraw at any time before "document or documents necessary to give legal effect to this transaction are executed

A and registered." HKL did not encourage or allow a belief or expectation on the part of the government that HKL would not withdraw. HKL proceeded in accordance with the proposals contained in the agreement in principle but at the same time they continued to negotiate the exact provisions of the documents which were necessary to be executed before the parties could become bound.

B There were significant events which indicated plainly that HKL, to the knowledge of the government, retained the right to withdraw from the agreement in principle.

By a licence dated 17 November 1981 the government authorised HKL to enter and demolish the buildings on Queen's Gardens. The licence was expressed to be revocable at any time without notice. Clause 22 stipulated:

C

> "The issue of this licence shall in no way be construed as having committed government to the permanent grant of the licensed area nor the concept and form of development which may be agreed in the event of a permanent grant proceeding."

This provision is inconsistent with the submission that the government

D believed that it was no longer possible for the government or HKL to withdraw from the agreement in principle. Clause 22 is only consistent with the desire on the part of the government to maintain the position constituted by the letters of agreement in principle namely that neither party would be bound until the necessary grants were made.

On 3 February 1982 HKL stipulated and the government accepted that in the event of the grant of the Tregunter flats not being completed

E before the end of the month, the occupation by the government of Tregunter would be deemed to be on the terms of a licence in a form which had already been agreed. The licence permitted the government to occupy the Tregunter flats but expressly provided that HKL might determine the licence by seven days' notice in writing in the event of "the grant not being made within six months of the date hereof." The licence required the government to deliver up vacant possession of the

F Tregunter flats to HKL if and when the licence was terminated. If the government believed that HKL could no longer withdraw from the agreement in principle and could not refuse to grant the Tregunter flats to the government then the government were not bound to accept a licence or to give up vacant possession of the Tregunter flats in any circumstances.

G The draft licence served to show that, although HKL had no immediate intention of withdrawing from the agreement in principle, they were entitled to revoke the licence and to recover possession of Tregunter in the event of the agreement in principle never becoming binding. It was argued that when six months expired, HKL did not attempt to revoke the licence and to regain possession of Tregunter and that their failure to do so encouraged the government to believe that

H HKL no longer retained the right to revoke the licence. But when the six months expired both sides were still hoping that the agreement in principle would be consummated and it was unnecessary for HKL immediately to recover possession of Tregunter. Their failure to do so

did not indicate that they surrendered the right to withdraw from the agreement in principle and, as they are now seeking to do, to recover possession of Tregunter after such withdrawal.

The evidence also discloses that the government did not rely on any belief or expectation that HKL would not withdraw from the agreement in principle. In an internal memorandum dated 18 September 1981 Mr. Ward, who was one of the government officials concerned with the negotiations, commented that a dispute on the cost of roadworks was holding up the conclusion of the agreement in principle. He advised:

> "the transaction has reached a point of 'no return,' particularly as government has taken possession of the Tregunter flats and in my view the only practical course is to allow the land company to have possession of the Queen's Gardens site . . . by way of a licence . . . to include the usual clause making it clear that no contract exists between government and the company until such time as a formal document is executed."

The memorandum continued:

> "The possible danger in proceeding as suggested above is that agreement on road costs may not be reached and if this should happen the exchange may never be concluded, but I do not expect this situation to materialise. Should the worst happen, government would have to come to some alternative arrangement with the land company for retaining the Tregunter flats already occupied or alternatively vacate these flats. Failure to conclude an agreement would be a messy business with claims for mesne profits, etc. and counterclaims . . ."

This memorandum makes it clear that the government did not believe that HKL were bound to proceed. In retrospect the government could have insisted before occupying Tregunter on acquiring Tregunter at the agreed price and providing for the purchase price to be placed on deposit pending the outcome of the Queen's Gardens negotiations. Mr. Ward is not to be blamed for failing to suggest this course before Tregunter was occupied when there was no reason to suspect the decline in the fortunes of HKL and the fall in the value of land which led HKL to withdraw in 1984. But Mr. Ward's memorandum makes it clear that the government were well aware of and accepted "the possible danger." In the event "the worst" happened with a resulting "messy business" which exceeded Mr. Ward's most gloomy forebodings.

Mr. Morritt relied on the decision of Woolf J. in *Salvation Army Trustee Co. Ltd. v. West Yorkshire Metropolitan County Council* (1980) 41 P. & C.R. 179. Mr. Morritt claimed that specific performance of an agreement "subject to contract" was ordered. The Bradford City Council told the Salvation Army that the council intended to acquire the site of the Salvation Army's meeting hall for road widening purposes and were prepared to negotiate on the basis of the sale of an alternative site by the council to the Salvation Army and on the basis of a payment to the Salvation Army of the reasonable costs of equivalent re-instatement pursuant to the compensation provisions of rule (5) of section 5 of the

Land Compensation Act 1961. It was eventually agreed "subject to contract" that the Salvation Army would acquire the new site valued at £4,500 and build a new hall. The amount which the district valuer was prepared to recommend as compensation for the acquisition of the old site on the basis of equivalent re-instatement amounted to £29,097. The Salvation Army wished to build the new hall before they vacated the old hall and applied to the city council for leave to enter and build on the new site. No formal reply was received to that application but with the knowledge of the city council the Salvation Army entered upon the new site, built the hall, paid for the new hall and did everything which was necessary to justify the payment of £29,097 on an equivalent re-instatement basis. The city council's highway responsibilities were then transferred to the defendant metropolitan county council. The metropolitan county council abandoned the road widening scheme and refused to acquire the old site or to pay the equivalent re-instatement compensation. Woolf J. held that the conduct of the city council in allowing the Salvation Army to take possession of the new site and to build a new hall encouraged the Salvation Army to believe that the city council would not resile from the arrangements which had been made subject to contract for the acquisition of the old site and payment of compensation on an equivalent re-instatement basis and he made an order for specific performance. The judge was clearly right to conclude that the metropolitan county council were bound to acquire the old site and to pay compensation of £29,097. But the fact that the arrangement was "subject to contract" was irrelevant. The Salvation Army did not enter on the new site and build the new hall because they hoped that an arrangement "subject to contract" would eventually result in a concluded binding agreement. The Salvation Army took possession of the new site and built the new hall in consequence of the expressed intention on the part of the city council to acquire the old site for a purpose for which the city council held compulsory acquisition powers. The city council expressly or impliedly represented that upon the exercise of their statutory acquisition powers they would be bound to pay and would pay compensation on an equivalent re-instatement basis pursuant to the Land Compensation Act 1961. The city council and their successors, the metropolitan county council, were estopped from denying or changing the expressed intention of the city council with regard to the acquisition of the old site under statutory powers or the representation with regard to the basis of compensation to which the Salvation Army would then be entitled. The Salvation Army were entitled to the statutory compensation for the statutory acquisition which the city council led the Salvation Army to expect. That expectation impelled the Salvation Army, to the knowledge of the city council, to enter and build on the new site.

In the present case the government acted in the hope that a voluntary agreement in principle expressly made "subject to contract" and therefore not binding would eventually be followed by the achievement of legal relationships in the form of grants and transfers of property. It is possible but unlikely that in circumstances at present unforeseeable a party to negotiations set out in a document expressed to be "subject to contract" would be able to satisfy the court that the parties had

subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document. But in the present case the government chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw.

In the result their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The defendants must pay the plaintiff's costs.

Solicitors: Macfarlanes; Linklaters & Paines.

S. S.

[HOUSE OF LORDS]

REGINA . . . . . RESPONDENT

AND

SPENCER AND OTHERS . . . . . APPELLANTS

REGINA . . . . . RESPONDENT

AND

SMAILS AND OTHERS . . . . . APPELLANTS

[CONSOLIDATED APPEALS]

1986 June 23, 24; July 24

Lord Hailsham of St. Marylebone L.C., Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Mackay of Clashfern and Lord Ackner

Crime—Evidence—Corroboration—Patients detained in secure hospital—Complaints against nurses of ill-treatment—Warning of danger of convicting on patients' uncorroborated evidence essential

Crime—Jury—Irregularity—Biased juror discharged from jury—Members of jury directed not to discuss case with discharged juror—Three members disregarding direction—Whether irregularity affecting trial

The defendants were employed on the nursing staff at a secure hospital. They were charged under section 126 of the Mental Health Act 1959 with ill-treating patients at the hospital. In two separate trials before the same judge, the prosecution case depended wholly on the uncorroborated evidence of patients who in each case had a criminal record and suffered from mental disorder. In the first trial, it was obvious that a juror had formed a definite view of the appellants' guilt and appeared to be biased against them. On the day before the trial ended when the judge had begun to sum up to the jury, the court learnt that the juror's wife worked at a mental hospital that had been referred to during the trial and that the juror had been in the habit of discussing the case with three other

members of the jury while giving them a lift to and from the court in his car. The juror was discharged from giving a verdict and the other members of the jury were directed not to discuss the case with him. The judge refused an application for the jury to be discharged.

In both trials the judge directed the jury that the evidence of the patients should be approached with great caution and explained the reasons for so doing. The defendants were convicted. Subsequently the Court of Appeal (Criminal Division) in *Reg. v. Bagshaw* [1984] 1 W.L.R. 477, which also concerned ill-treatment of patients at the same hospital, held that a full warning that it was dangerous to convict on those patients' uncorroborated evidence was essential.

On the defendants' appeals the Court of Appeal (Criminal Division) had before them a written statement from the discharged juror in the first trial (which was not before the trial judge), that he had discussed the case with three of the remaining jurors after he had been discharged. The Court of Appeal, declining to follow *Reg. v. Bagshaw*, dismissed the appeals, holding further in the first case, that there was no real danger of the defendants' case being prejudiced by the juror's conduct.

On appeal:—

Held, (1) dismissing the second appeal, that in cases where the prosecution evidence was solely that of witnesses not in any of the accepted categories of suspect witnesses but who, by reason of their particular mental condition and criminal background, fulfilled analogous criteria, a trial judge was under a duty to make the jury fully aware of the dangers of convicting on such evidence, though in so doing the use of the words "danger" or "dangerous" were not essential and that in any event the trial judge's directions had been entirely adequate (post, pp. 134G–H, 135D–G, 142E–G).

Reg. v. Beck [1982] 1 W.L.R. 461, C.A. approved.

Reg. v. Bagshaw [1984] 1 W.L.R. 477, C.A. overruled.

Reg. v. Kilbourne [1973] A.C. 729, H.L.(E.) considered.

(2) Allowing the first appeal, that the verdict would be quashed as unsafe and unsatisfactory on the ground that there was a real possibility that some jurors could have been prejudiced or biased by their conversation with the discharged juror (post, pp. 133B–D, 135D–G, 145H—146D).

Reg. v. Sawyer (1980) 71 Cr.App.R. 283, C.A. approved.

Per curiam. In a case which does not fall into the three established categories and where there exists potential corroborative material, the extent to which the trial judge should make reference to that material depends on the facts of each case and the overriding rule is that he must put the defence fairly and adequately (post, p. 142H).

Decision of the Court of Appeal (Criminal Division) [1985] Q.B. 771; [1985] 2 W.L.R. 197; [1985] 1 All E.R. 673 affirmed in part.

The following cases are referred to in their Lordships' opinions:

Reg. v. Bagshaw [1984] 1 W.L.R. 477; [1984] 1 All E.R. 971, C.A.

Reg. v. Beck [1982] 1 W.L.R. 461; [1982] 1 All E.R. 807, C.A.

Reg. v. Boardman [1975] A.C. 421; [1974] 3 W.L.R. 673; [1974] 3 All E.R. 887, H.L.(E.)

Reg. v. Hester [1973] A.C. 296; [1972] 3 W.L.R. 910; [1972] 3 All E.R. 1056, H.L.(E.)

Reg. v. Kilbourne [1973] A.C. 729; [1973] 2 W.L.R. 254; [1973] 1 All E.R. 440, H.L.(E.)

Reg. v. Prater [1960] 2 Q.B. 464; [1960] 2 W.L.R. 343; [1960] 1 All E.R. 298, C.C.A.

Reg. v. Price (Herbert) [1969] 1 Q.B. 541; [1968] 2 W.L.R. 1397; [1968] 2 All E.R. 282, C.A.

Reg. v. Russell (1968) 52 Cr.App.R. 147, C.A.

Reg. v. Sawyer (1980) 71 Cr.App.R. 283, C.A.

Reg. v. Turnbull [1977] Q.B. 224; [1976] 3 W.L.R. 445; [1976] 3 All E.R. 549, C.A.

Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718; [1944] 2 All E.R. 293, C.A.

The following additional cases were cited in argument:

Davies v. Director of Public Prosecutions [1954] A.C. 378; [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507, H.L.(E.)

People v. Casey (No. 2) [1963] I.R. 33

Reg. v. Box [1964] 1 Q.B. 430; [1963] 3 W.L.R. 696; [1963] 3 All E.R. 240, C.C.A.

Reg. v. Frow (unreported), 23 June 1982

Reg. v. Holland [1983] Crim.L.R. 545, C.A.

Reg. v. Hood [1968] 1 W.L.R. 773; [1968] 2 All E.R. 56, C.A.

Reg. v. Stannard [1965] 2 Q.B. 1; [1964] 2 W.L.R. 461; [1964] 1 All E.R. 34, C.C.A.

Appeals from the Court of Appeal (Criminal Division).

These were appeals by leave of the House of Lords by the appellants Alan Widdison Spencer, Kenneth Ball and Michael Dennis Mason and by George Glenville Smails, Paul White and Kenneth Ball again, against the decision of the Court of Appeal (Criminal Division) (May L.J., Drake and Anthony Lincoln JJ.) [1985] Q.B. 771 dismissing their appeals against their convictions at the Crown Court at Nottingham (Judge Hopkin) on 24 June and 12 October 1983 of offences of ill-treating patients contrary to section 126 of the Mental Health Act 1959.

The Court of Appeal (Criminal Division) certified that the following point of law of general public importance was involved in the decision, namely:

> "In a case where the evidence for the Crown is solely that of a witness who is not in one of the accepted categories of suspect witnesses, but who, by reason of his particular mental condition and criminal connection, fulfilled the same criteria, must the judge warn the jury that it is dangerous to convict on his uncorroborated evidence?"

Simon Hawkesworth Q.C. and *Brian Sommerville* for the appellants. As a matter of law there are three categories of witness in respect of which a full warning as to the danger of convicting upon uncorroborated evidence is required: an accomplice, the victim of a sexual offence or a child giving sworn evidence. The patients who gave evidence in the instant cases, in hospital under the Mental Health Act 1959, and

A similarly the patients in *Reg. v. Bagshaw* [1984] 1 W.L.R. 477, fall outside those categories. However, in such cases the judge has a residual discretion to give such a warning on the basis that it is plainly required, and where it is not given the Court of Appeal may quash the conviction. The common law does not stand still but is flexible enough to adapt to new circumstances, as is shown in relation to corroboration by *Davies v. Director of Public Prosecutions* [1954] A.C. 378, *Reg. v. Hester* [1973] B A.C. 296 and *Reg. v. Kilbourne* [1973] A.C. 729. As in negligence, the categories are never closed. See also: *Reg. v. Prater* [1960] 2 Q.B. 464, *Reg. v. Stannard* [1965] 2 Q.B. 1, *Reg. v. Russell* (1968) 52 Cr.App.R. 147 and *People v. Casey (No. 2)* [1963] I.R. 33. [Reference was also made to *Reg. v. Price (Herbert)* [1969] 1 Q.B. 541 and *Reg. v. Holland* [1983] Crim.L.R. 545 as to the relative strength of the warning, and C *Reg. v. Frow* (unreported), 23 June 1982 as to the summing-up.]

Mentally ill patients with criminal convictions in hospital under the Mental Health Act 1959 are an easily identifiable group. It should have presented no difficulty to the judge to regard them as suspect witnesses similar to those in the three accepted categories. They fulfilled the criteria in a very high degree, as follows: 1. On the evidence there was clearly a possibility that they were deliberately lying (being anti-authority D and seeking revenge) as, for different reasons, an accomplice. 2. There was a tendency for the witnesses to fantasise or to fabricate their evidence, as in the case of children. 3. There was the possibility of their having psychological motives for misleading the court, as in the case of sexual offence complainants. 4. The allegations in such cases as the present were easy to make against the nursing staff but difficult to E refute. Therefore there was a duty on the judge to give warnings in the strongest possible terms. It is not suggested that a separate category should be created, as a full warning is not required in every case involving a mentally ill patient with criminal convictions, but in the present cases such a warning was required and the verdicts are therefore unsafe and unsatisfactory.

With reference to the first appeal, the verdict was further unsafe F because of the possibility of bias following conversations between jurors and a discharged juror amounting to a serious irregularity in the course of the trial: see *Reg. v. Box* [1964] 1 Q.B. 430 and *Reg. v. Hood* [1968] 1 W.L.R. 773.

Jeremy Roberts Q.C. and *Richard Dixon* for the Crown. With reference to the discharged juror, it cannot be said that any of the G remaining jurors would have reached a different verdict had they not conversed with him. The verdict is not unsafe on that ground. Dealing with the certified point, a warning is required about something which a juror might not otherwise realise. Here, the potential unreliability of the witnesses had been amply demonstrated during the trials. In any event the judge gave, in effect, a "model" warning which brought home to the jury all the dangers, which he then spelt out. Such a "tailor-made" H direction is preferable to the use of a particular form of words as a set formula.

Their Lordships took time for consideration.

24 July. LORD HAILSHAM OF ST. MARYLEBONE L.C. My Lords, I agree with the disposal of the second appeal about to be recommended by my noble and learned friend, Lord Ackner, whose judgment on the merits I have had the advantage of reading in draft, and which is now available in print. I also agree with his proposed answer to the certified question.

As regards the first appeal (that relating to Spencer and others), I have no doubt that this appeal should be allowed on the ground that owing to irregularities in the trial, in relation to a particular juror, the verdict must be regarded as unsafe and unsatisfactory. I do not believe that, in the rather special circumstances of this case, the Court of Appeal were entitled to speculate as to what may or may not have occurred after the jury had retired or as to the circumstances which may or may not have influenced their verdict of guilty by a majority of ten to one after deliberating for five hours.

Without such speculation the following facts are clear beyond peradventure.

(1) The first is that, just before the jury were about to retire, and on an application by defending counsel to discharge the jury, the judge learned of circumstances which, in his opinion at least, made it unsafe to permit one juryman, Mr. Peet, to remain on the jury. The avowed reason when given was that the juryman in question had, through his wife, a somewhat tenuous connection with the institution at which the accused were employed as nurses, but one is, I think, entitled to assume that the judge considered it arguable that, through his wife, the juryman might have been exposed to gossip prejudicial to the accused about the merits of the case. What is beyond doubt is that, even at this stage, and apparently throughout the trial, the juryman in question had unequivocally evinced a most unjudicial bias against the defence and this may well have acted as an additional factor in influencing the judge's mind. However, I believe in these circumstances that the judge acted correctly in then declining to discharge the whole jury.

(2) The second fact beyond dispute is that when, on the following day, defence counsel renewed his application to discharge the jury, in refusing the application, the judge first of all misdirected himself as to the correct test to apply and secondly took into account factors which should have been disregarded in considering the result of the application. In considering such an application, the interests of justice should be paramount, and neither the inconvenience of a second trial nor the necessity which would have been involved in calling again as witnesses the victims of the alleged assaults, possibly to their detriment, should have outweighed the necessity of the accused receiving, and being seen to receive, a fair trial. The effect of these misdirections when the point was raised on appeal was to free the Court of Appeal in the use of their own discretion of any necessity to be guided by the judge's own use of his discretion.

(3) The third point which is beyond dispute is that, after discharging Mr. Peet from the jury, the judge permitted him to remain behind in the precinct of the court in order to give a lift in his own car to three of the remaining members of the jury over a journey taking about half-an-hour. My own view is that the judge was mistaken so to do, but,

whether this view be correct or not, the judge thought it imperative specifically to warn the three jurors who were to avail themselves of the lift not to discuss the case with Mr. Peet when they were with him in the car. What the judge did not know on the renewal of the application on the following day, but what, by the time they heard the appeal, the Court of Appeal certainly did know, was that this warning had been disregarded. I do not believe that the judge could have exercised his discretion so as to refuse the defence application when it was renewed the following day, at least without diligent inquiry as to the nature of the discussion, had he been aware that his specific warning had been disregarded in this way.

(4) In the event, the Court of Appeal formed the view that there was "no realistic chance" of the discussion in the car (whatever it was) having influenced the verdict. Although they had available to them the statement prepared by the Director of Public Prosecutions they seem to have made no additional inquiry as to what had happened, and though, of course, it may be true that nothing detrimental had taken place, I do not think they had enough material on which to say that it had not. This was a case of total want of corroboration, a majority verdict of 10-1, and a wholly unauthorised and improper conversation between a juror who had been sent off the jury as not suited to remain there with three of the remaining jurors in the absence of the other eight and in disregard of an express warning by the judge against such conduct. In my view this constituted a serious breach of natural justice and the resulting verdict must be treated as unsafe and unsatisfactory. In such a case as this there can be no question of applying the proviso.

As regards the certified question, I am content to accept what is about to fall from my noble and learned friend. But, in view of certain parts of the judgment of the Court of Appeal, there are certain additional comments I would wish to make. It is well known that the law of Scotland does not admit of a conviction on the uncorroborated evidence of a single witness, but that the law of England does. There are a certain number of statutory exceptions to which I drew attention in *Reg. v. Kilbourne* [1973] A.C. 729, 739-740. In addition there are certain categories or classes of case which, by the time of the establishment of the Court of Criminal Appeal in 1907, had already hardened into firm rules of practice. In these, in the absence of a special warning from the trial judge, a conviction will normally be set aside as unsafe or unsatisfactory unless the court decides that it is safe to apply the proviso. I referred to these, at p. 740. My reference to cases of alleged mistaken identity has now been overtaken by events, viz. by the Devlin Report (Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976) H.C. 338) and *Reg. v. Turnbull* [1977] Q.B. 224, and need not, therefore, be referred to further, but there are also references to what I said in *Kilbourne*, both in *Archbold Criminal Pleading Evidence & Practice,* 42nd ed. (1985), p. 1136 and in the judgment of the Court of Appeal which, in my view at least, need correction. In *Reg. v. Hester* [1973] A.C. 296, which shortly preceded

the hearing of *Kilbourne*, Lord Morris of Borth-y-Gest had said, at p. 315:

> "The weight of the evidence is for the jury . . . It is for the jury to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. Any risk of the conviction of an innocent person is lessened if conviction is based upon the testimony of more than one acceptable witness."

When in *Kilbourne* I said, at p. 746:

> "Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise"

I was there expressly referring back to this passage in Lord Morris' speech in *Hester*, and the suggestion that this is an alternative approach to that of Lord Reid, at p. 750, would, I think, have astonished Lord Morris and Lord Reid as much as it did me when first I read it and I said as much in *Reg. v. Boardman* [1975] A.C. 421, 454. The contrary view seems to me pure fantasy.

The other point on which I would wish to comment is the Court of Appeal's view on my reference in *Kilbourne* [1973] A.C. 729, 740 when I added witnesses "of admittedly bad character" to the number of cases where a warning of some kind was required as to the danger of convicting without corroboration. I was, of course, using the phrase in the technical sense of witnesses who have been shown to be not of a character to make them worthy to be believed on their oath. In this connexion I must say that even if there were not authority to support this view (and I believe there is plenty), I would regard it as a matter of sheer common sense that if a judge did not warn the jury of the possible danger of convicting an innocent man if they convicted solely on the disputed but uncorroborated testimony of such a person, his failure to do so would, apart from the proviso, make a verdict unsafe and unsatisfactory in the extreme. The fact is, I believe, that in the instant appeal, the Court of Appeal, confronted with the contrary decision in *Reg. v. Bagshaw* [1984] 1 W.L.R. 477 with which they rightly disagreed, were haunted by the spectre of *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718. However this may be, your Lordships were not troubled by this spectre, nor do I wish to pursue it in the present case, since I am fully persuaded by my noble and learned friend, that *Bagshaw* was wrongly decided and that, even on the view most favourable to the appellants in *Bagshaw* and in the instant appeals, Judge Hopkin gave a perfectly adequate warning to the jury of the danger of convicting on the uncorroborated testimony of the witnesses for the prosecution. He not only advised them of the necessity of proceeding with extreme caution, but warned them specifically of the dangers they would be incurring if they did not do so.

The cases which were cited to the contrary, e.g. *Reg. v. Price (Herbert)* [1969] 1 Q.B. 541, were, as it seems to me, cases in which the

particular dangers were not sufficiently spelled out in detail as the trial judge did here.

The only other observation I would make on the certified question is that the modern cases, quite correctly in my view, are reluctant to insist on any magic formula or incantation, and stress instead the need that each summing up should be tailor-made to suit the requirements of the individual case: c.f. *Reg. v. Hester* [1973] A.C. 296, *per* Lord Morris of Borth-y-Gest at p. 309, *per* Lord Pearson at p. 321, and *per* Lord Diplock at pp. 325, 328. In particular, when as here, it is agreed that no corroboration exists, a disquisition on what can or could amount to such if corroboration were needed is emphatically not required and greatly to be discouraged (*per* Lord Diplock, loc.cit.). Speaking for myself, I even dislike the expression "categories" as applied to the cases. They are simply classes of case where the experience of the courts has gradually hardened into rules of practice, owing, as my noble and learned friend points out, partly to the inherent dangers involved, and partly to the fact that the danger is not necessarily obvious to a lay mind. The less juries are confused by superfluous learning and the more their minds are directed to the particular issues relevant to the case before them, the more likely they are, in my view, to arrive at a just verdict.

Lord Bridge of Harwich. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hailsham of St. Marylebone L.C. and Lord Ackner. In regard to the first appeal I agree with the views expressed by my noble and learned friend on the Woolsack and would allow the appeal for the reasons he has given. I would dismiss the second appeal for the reasons given by my noble and learned friend, Lord Ackner, and answer the certified question as he proposes.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it, and for the reasons which he gives I would allow the appeals of Spencer, Ball and Mason, and dismiss those of Smails, Ball and White.

Lord Mackay of Clashfern. My Lords, I have had the privilege of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it and with the orders he proposes in these appeals.

Lord Ackner. My Lords, the appellants in these consolidated appeals were members of the nursing staff at Rampton Hospital, which is a secure hospital catering for patients suffering from mental disorders. The majority of such patients have been sent to Rampton as the result of court orders made under the Mental Health Act 1959 or the Mental Health Act 1983, by reason of their having been convicted of serious crimes. A television programme was shown in 1979 which made a substantial number of allegations of ill-treatment to patients by the nursing staff over a period of some years. This led to police inquiries

and resulted in 14 separate trials at the Crown Court at Nottingham. In five of those trials, the defendants were convicted and your Lordships are concerned with two of such trials. The first four of the fourteen trials were presided over by High Court judges, and the remaining trials, with the approval of the presiding judges of the circuit, were presided over by Judge Hopkin.

On 24 June 1983 in the Nottingham Crown Court, the three appellants, Spencer, Ball and Mason, were convicted, as to Spencer on six counts of ill-treating a patient contrary to section 126 of the Mental Health Act 1959 and as to Ball and Mason, each on one similar count. Spencer was sentenced to 12 months' imprisonment on each count concurrent, suspended for two years. Ball and Mason were each sentenced to six months' imprisonment, suspended for 18 months. On 12 October 1983 in the same Crown Court, the appellants White, Smails and Ball again were each convicted of one similar offence contrary to the provisions of the same section of the Act of 1959. On 19 October 1983 they were each sentenced to six months' imprisonment suspended for 18 months. In both trials the convictions arose from substantially similar facts and the appeals were the subject of a single judgment in the Court of Appeal (Criminal Division) [1985] Q.B. 771. In each appeal the same question as to the adequacy of the judge's direction to the jury on the way in which they should treat the evidence of the complainants was raised. Hence the order for consolidation of the two appeals before your Lordships' House.

In all the trials, the prosecution case against the nurses depended very largely upon the uncorroborated evidence of a single patient. I say, "very largely", because there were apparently some alleged incidents of violence which were witnessed by patients who were themselves complainants to other incidents. Judge Hopkin fully appreciated that in those circumstances very careful thought had to be given as to how he should direct the jury to approach the prosecution's case. In one of the earlier, if not the earliest, of the trials over which he presided, he informed counsel, in advance of his summing up, of the warning which he proposed to give to the jury. This warning was fully approved by leading counsel J. R. Roberts Q.C. for the prosecution, who has appeared before us on behalf of the Crown, and Wilfred Steer Q.C. who appeared for the defence in all or the majority of the trials, including the two the subject matter of this consolidated appeal. It was further agreed between counsel and approved by the judge, that for the greater protection of the accused, the judge would inform the jury in his summing up, that one patient could not be treated as supporting another, with the result that the prosecution case depended entirely upon the uncorroborated evidence of a single patient. This was but one example of the care that was taken to ensure complete fairness to the accused. The judge's direction as to the way in which they should approach the evidence of the complainants was in substance the same in each case. At an early stage in his summing up he gave them a general instruction. There is no real difference in what he said in either of the two appeals and I therefore quote the language which he used in the first of the two trials. He said:

A "You must, ladies and gentlemen, approach the evidence of Mr. Hosein, Mr. Firth, Mr. Evan Glyn Hughes, Mr. William Hughes, Mr. Alldred, and Mr. Nugent with great caution. Why? Well for three reasons, Firstly, because they are all persons of bad character. The law, in rules which are formulated over many years, requires me to tell you even if they were merely persons of bad character and nothing else, that you must approach their evidence with great B caution. It goes further than that of course in this case. The second reason is this, that at the time of these events they were all persons suffering from some form of mental disorder. Thirdly, they may of course have all conspired together to make false allegations. People make false allegations as we know for all sorts of reasons, some of which have been suggested in this case, but apart from that your C own experience no doubt tells you that people do on occasions make false allegations. So therefore I must tell you that as far as all those patients are concerned you must approach their evidence with great caution. You would be wise to look for support for their evidence for those reasons. I tell you at once, Mr. Steer is right, and Mr. Roberts does not argue to the contrary, that there is no D support for their allegations at all because as far as they are concerned even where you have two or three of them giving evidence upon one particular count, one witness of this type cannot support another. But, if, ladies and gentlemen, having seen them and having heard them and borne in mind the warning which I have given to you, you come to the conclusion that you are sure in all or any of their cases they are telling the truth, then you may convict E upon their evidence without there being any support at all. It is, as I say, for you to judge the facts. When I say the facts I mean also the importance which you attach to any particular witness and whether or not he is telling the truth."

Having given this warning, he then referred to the three defendants, F emphasising that they were all men of good character, describing each in detail and referring to the testimonials which witnesses at the trial had given to each of them. He drew particular attention to the fact that the alleged incidents had occurred some years ago, that Rampton was part a prison and part a hospital, that in both parts there were outbreaks of violence which had to be quelled, and that those who looked after the G patients had on occasions to resort to force. He referred in some detail to the absence of complaints by the patients, and the factors which the jury might consider taking into consideration when considering the significance of this aspect of the case. The judge, taking each count separately, then drew the jury's attention immediately to the character and characteristics of the complainant. He dealt in detail with his previous convictions, with his progress at Rampton, which had been the H subject matter of medical evidence, and to the views of the psychiatrist employed at Rampton as to his personality defects, e.g. that he was prone to fabricate without any conscience and to pursue wrong without any feeling—he had a tendency to resentment against authority and to

fly into a mood which might involve considerable violence (count one—Mr. Hosein).

In view of my earlier reference to the judge having sought and obtained counsel's agreement to his proposed direction to the jury as to the way in which they should approach the evidence of the complainants, the circumstances in which his direction came to be criticised in the Court of Appeal is of some relevance. On 11 May 1982 Bagshaw, Holmes and Starkey were found guilty at the Crown Court at Nottingham of ill-treating patients contrary to section 126 of the Act of 1959 and were sentenced by Judge Hopkin. They applied to the Court of Appeal (Criminal Division) *Reg. v. Bagshaw* [1984] 1 W.L.R. 477 for leave to appeal against these convictions on the grounds that they were unsafe by reason of the inadequacy of the evidence, asserting that it was uncorroborated and unsupported in any material particular and that the patients who gave the evidence were inherently unreliable. We were told that in the application for leave to appeal it was stated in terms that: "no criticism is or could be made of the summing up." The Court of Appeal apparently thought otherwise, and during the hearing gave leave to the appellants to amend their grounds so as to question the adequacy of the judge's direction to the jury as to the treatment of the evidence of the complainants. A short adjournment was granted for this new approach to be considered, and after hearing further submissions the Court of Appeal reserved its judgment.

The warning given by Judge Hopkin in *Reg. v. Bagshaw* was in similar, though perhaps stronger terms. O'Connor L.J., in giving the judgment of the court, said at an early stage in the judgment, at p. 479:

> "We should like to say at once that the judge's summing up is a masterpiece of lucidity and fairness. He gave an impeccable direction to the jury that they should treat the evidence of the complainants with the greatest caution. The question is whether these witnesses were such that a full warning was required, namely, that it was dangerous to convict upon their unsupported evidence."

The "full warning" to which O'Connor L.J. was referring is the warning as to the danger of convicting upon uncorroborated evidence, which by rule of practice has to be given if the prosecution is relying upon the evidence of an accomplice, or the victim of a sexual offence or the sworn evidence of a child.

Having considered the well known cases of *Reg. v. Kilbourne* [1973] A.C. 729 and *Reg. v. Hester* [1973] A.C. 296, the judgment continued [1984] 1 W.L.R. 477, 484:

> "Patients in hospital under the Mental Health Act 1959 are not a category like accomplices or complainants in sexual cases, nor would we wish to make them into an additional category. Patients detained in a special hospital after conviction for an offence or offences, even if they are not a category, may well fulfil to a very high degree the criteria which justify the requirement of the full warning in respect of witnesses within accepted categories. It seems to us that in such cases nothing short of the full warning that it is

dangerous to convict on the uncorroborated evidence of the witness will suffice."

Thus, because Judge Hopkin had not used the words "it is dangerous to convict" the Court of Appeal concluded that the convictions were unsafe and they were therefore quashed. The court, however, in the final paragraph of the judgment commented in relation to the original grounds of appeal, that if they had stood alone they might or might not have sufficed adding, at p. 484:

> "We say that because we are conscious that in practice it would mean that the protection afforded to patients by section 126 of the Act of 1959 would be cut down to a large extent. It would be tantamount to saying that a conviction based on the uncorroborated evidence of such a complainant could not be safe. That would be to step outside the common law and usurp the function of Parliament."

When the appeals with which your Lordships are concerned came to be heard by the Court of Appeal, differently constituted, the first submission made on behalf of the appellants was that the court was bound by the decision in *Reg. v. Bagshaw*, and since that case could not be distinguished on its facts, the appeals should be allowed. On behalf of the Crown, Mr. Roberts submitted to the Court of Appeal that the court's decision in the *Bagshaw* case was reached per incuriam. In *Bagshaw*, Mr. Roberts had not come prepared to deal with the amendment which was made only at the suggestion of the court. Although following the short adjournment he sought to deal with the new ground as adequately as he could in his reply, he did not deal with the point as fully as he would otherwise have done, and in particular the court's attention was not drawn to an earlier decision of the Court of Appeal, namely, to *Reg. v. Beck* [1982] 1 W.L.R. 461. In that case the main ground of appeal was that the judge wrongly failed to direct the jury that it would be dangerous to act on the uncorroborated evidence of three witnesses, none of whom could be considered as participants or involved in the crime charged, but who "had a purpose of their own to serve in giving evidence, namely to cover up false representations made or acceded to by them in the insurance claim": see p. 466. In *Beck*'s case the appellant's counsel based his contention that such a warning should have been given essentially upon *Reg. v. Prater* [1960] 2 Q.B. 464. In that case a co-prisoner, who could have been considered an accomplice, gave evidence. The Common Serjeant, Sir Edward Anthony Hawke, did not give a warning in regard to his testimony and the danger of acting upon it unless corroborated. Edmund Davies J. in the course of the judgment of the Court of Criminal Appeal said, at p. 466:

> "For the purposes of this present appeal, this court is content to accept that whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve . . . In the circumstances of the present appeal it is sufficient for this court to

express the view that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts . . ."

The Court of Appeal in *Reg. v. Beck* [1982] 1 W.L.R. 461, 468 having considered subsequent decisions in which *Prater*'s case was criticised, concluded that the phrase in *Reg. v. Prater* [1960] 2 Q.B. 464, 466, "it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given" is confined to cases where witnesses may be participants or involved in the crime charged. The Court of Appeal [1982] 1 W.L.R. 461 further observed, at p. 469:

> "While we in no way wish to detract from the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

The phrase, "with all that that entails," requires perhaps further explanation. Where there is no corroboration, the rule of practice merely requires that the jury should be warned of the danger of relying upon the sole evidence of an accomplice or of the complainant in the sexual case, or upon the evidence of a child. The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance. The jury are, of course, told that while as a general rule it is dangerous so to act, they are at liberty to do so if they feel sure that the uncorroborated witness is telling the truth. Where, however, there is evidence before the jury which they can properly consider to be corroborative evidence the position becomes less simple. The trial judge has the added obligation of identifying such material, and explaining to the jury that it is for them to decide whether to treat such evidence as corroboration. He should further warn them against treating as potential corroborative evidence, that which may appear to them to be such, but which is not so in law, e.g. evidence of a recent complaint in a sexual offence. Moreover where the prosecution are relying, as potential corroborative material, upon lies alleged to have been told by the accused, a particularly careful direction is needed. A special direction is also often needed where evidence of complainant's distress is relied upon by the prosecution in sexual cases as potentially corroborative material. The trial judge has further the additional obligation of directing the jury that accomplices, who are parties to the same charge, cannot corroborate each other.

The Court of Appeal was, in my judgment, fully entitled to conclude that had the court in *Reg. v. Bagshaw* [1984] 1 W.L.R. 477 had the benefit of the full argument which they had had in these two appeals, and, in particular, had their attention drawn to *Reg. v. Beck* [1982] 1

W.L.R. 461, a different conclusion might have been reached. They accordingly concluded they were not bound by the decision in *Bagshaw*'s case. I consider that they were entitled so to decide.

In the submissions before your Lordships' House, there has been little, if any dispute, as to the relevant law. Counsel for the appellants has fully accepted the decision of the Court of Appeal both in *Bagshaw*'s case and in these two appeals, that patients in hospital under the Mental Health Acts are not in a category like accomplices or complainants in sexual cases or young children. To create from them such a new category would clearly involve considerable problems of definition. What sort of patients, and patients with what sort of criminal records are to be included? The submission of the appellants, in essence, is that without use of the word "danger", in any case analogous to those of the three established categories, and where the evidence of the only or principal witness relied upon by the prosecution is inherently unreliable, such a warning must be inadequate. I cannot agree. It has been said both in the Court of Appeal and in your Lordships' House, that the obligation to warn a jury does not involve some legalistic ritual to be automatically recited by the judge, or that some particular form of words or incantation has to be used and, if not used, the summing up is faulty and the conviction must be quashed: see *Reg. v. Russell* (1968) 52 Cr.App.R. 147, 150 *per* Diplock L.J. There is no magic formula which has to be used with regard to any warning which is given to juries: *Reg. v. Price (Herbert)* [1969] 1 Q.B. 541, 546 *per* Sachs L.J. As this is no mere idle process it follows that there are no set words which must be adopted to express the warning. Rather must the good sense of the matter be expounded with clarity and in the setting of a particular case: *Reg. v. Hester* [1973] A.C. 296, 309 *per* Lord Morris of Borth-y-Gest. The summing up should be tailored to suit the circumstances of the particular case: *Reg. v. Kilbourne* [1973] A.C. 729, 741 *per* Lord Hailsham of St. Marylebone L.C.

To my mind the question raised by these appeals is both simple to define and simple to answer. Given that it is common ground that a warning was required as to the way in which the jury should treat the evidence of the complainants, the question is: was that warning sufficient? Did it in clear terms bring home to the jury the danger of basing a conviction on the unconfirmed evidence of the complainants?

In the three established categories where the "full warning" is obligatory, the inherent unreliability of the witness may well not be apparent to the jury. Hence the phrase often used in a summing up—it is the experience of the courts accumulated over many years etc. etc. Complainants of sexual assaults do on occasions give false evidence for a variety of reasons, some of which may not have occurred to a jury. Accomplices may have hidden reasons for lying, and this possibility may again not be apparent to a jury. Children who, although old enough to understand the nature of an oath and thus competent to give sworn evidence, may yet be so young that their comprehension of events and of questions put to them, or their own powers of expression, may be imperfect. All this needs properly to be spelt out to the jury. Hence the well established rule of practice.

In other cases the potential unreliability of the sole or principal witness for the prosecution is obvious for all to see. These were such cases. The complainants were men of bad character. They had been sent to Rampton rather than to an ordinary prison, because they were mentally unbalanced. That they were anti-authoritarian, prone to lie or exaggerate, and could well have old scores which they were seeking to pay off, was not disputed. Notwithstanding that the possibility of their evidence being unreliable was patent, that it was clearly dangerous to prefer their evidence to that of the defendants, all men of good character on whose behalf witnesses had spoken in glowing terms, the judge nevertheless told the jury in the clearest possible terms and repeated himself, that they must approach the evidence of the complainants with great caution. It is common ground that having given that warning, he then identified the very dangers which justified the exercise of great caution. He gave three reasons. First, they were all persons of bad character; secondly, they were all persons suffering from some form of mental disorder, and thirdly, they may have all conspired together to make false allegations. Thus the judge warned the jury of the dangers of relying on the complainants' testimony because, for the reasons which he gave, such testimony could well be unreliable. The judge, however, did not leave the matter there. As previously stated he pointed out, when dealing with each count, the details of the background of the complainant, his past criminal record, the nature of his mental disturbance and his history in the hospital, and perhaps most important of all, the hospital psychiatrist's view of the personality defects from which the patient suffered and of which I have already given a typical example. I agree with the Court of Appeal that he gave the emphatic warning which was required to meet the justice of the case. Indeed had this been one of the category of cases which required the "full warning" then the judge's direction would have been fully adequate.

The certified point of law is in these terms:

> "In a case where the evidence for the Crown is solely that of a witness who is not in one of the accepted categories of suspect witnesses, but who, by reason of his particular mental condition and criminal connection, fulfilled the same criteria, must the judge warn the jury that it is dangerous to convict on his uncorroborated evidence."

I would amend the question by substituting for the words "the same criteria" "analogous criteria." I would then answer the question in the affirmative, adding, for the sake of clarity, that while it may often be convenient to use the words "danger" or "dangerous," the use of such words is not essential to an adequate warning, so long as the jury are made fully aware of the dangers of convicting on such evidence. Again, for the sake of clarity I would further add that *Reg. v. Beck* [1982] 1 W.L.R. 461 was rightly decided and that in a case which does not fall into the three established categories and where there exists potential corroborative material, the extent to which the trial judge should make reference to that material depends upon the facts of each case. The overriding rule is that he must put the defence fairly and adequately.

A On 18 December 1984 your Lordships' House gave the appellants, Spencer, Ball, and Mason, leave to appeal against the decision of the Court of Appeal (Criminal Division) on an additional ground, namely "on the question whether incidents relating to the conduct of a member of the jury both before and after the juror was discharged were of such serious proportions as to render their convictions unsafe or unsatisfactory." The facts were these. During this trial it became clear B both to the judge and counsel that one male juror, a Mr. Peet, had early formed a definite view of the case, which was hostile to the defendants, and on occasions clearly showed that he was biased against the defendants and in favour of the prosecution. For example, he showed his impatience at having to listen to the cross-examination of one or more of the complainants. Both the judge and counsel were C concerned at this situation, and after consultation, decided to take no action.

However, a member of the jury informed a court usher that Mr. Peet's wife worked at the Eastdale Unit of Balderton Hospital, another mental hospital which figured in the evidence in the trial. It was an establishment to which some patients went as a half-way house before their ultimate discharge. Mr. Peet's wife apparently worked there as a D cleaner. The judge was given this information during the short adjournment on the day before the trial ended and after the judge had begun his summing up. The trial was then on its tenth day. The judge raised the matter with counsel in the absence of the jury. He informed them that he would have the jury back, seek from Mr. Peet confirmation of the facts which had been communicated to him, and if they were E accurate, discharge him. He observed to counsel:

> "It may well be that in the course of conversation with his wife, he has heard things which it would be better if he had not. I have considered whether in the circumstances it would be necessary to discharge the whole of the jury but I do not feel that it is such a case myself."

F When the jury returned to court, Mr. Peet confirmed, in answer to the judge's question, that his wife did in fact work at the Eastdale Unit. Mr. Peet asked the judge whether "it would be all right to wait in the anteroom because I have got three to take back to Newark"—a half-an-hour journey from the court. The judge agreed and Mr. Peet left court. To the remaining eleven jurors the judge observed:

G

> "Members of the jury, you realise of course, I am sure, how very careful we have to be. Who he is giving a lift back to Newark, I know not. If it is any of you I must enjoin you, please do not discuss this case with Mr. Peet any further."

By next morning defence counsel had had an opportunity of thinking rather more fully about what Mr. Peet had said the previous day, and H had also learned that Mr. Peet had been in the habit of giving three of his fellow jurors a daily lift to and from their homes in Newark, which was near where he himself lived. In those circumstances the probabilities were that Mr. Peet would have aired his anti-defence opinions during

those car journeys and possibly given his passengers other information prejudicial to the three defendants. Application was therefore made to the judge for the discharge of the remaining eleven jurors. The application was resisted by the prosecution. It was pointed out that if there were to be a retrial the witnesses would have to be recalled. Concern had already been expressed by doctors and others about the effect that the giving of evidence and the experience of being cross-examined had had upon the Rampton patients involved. Mr. Roberts submitted that the test which the judge should apply was that the jury should not be discharged unless it could be shown that there was "a very high risk" that the apparently biased juror had influenced any of his fellow jurors.

Mr. Roberts accepted, both in the Court of Appeal and before us, that he had expressed the test in terms which were too strict. The correct test is the one stated in *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283, 285 namely, whether there was a "real danger" that the appellants' position had been prejudiced in the circumstances which I have outlined. In the course of giving his ruling, the judge said:

> "This is an anxious matter. I bear in mind that this case is now in its tenth day. I also bear in mind that so far as these defendants are concerned, through no fault of their own I hasten to add, through no fault of the prosecution, years have passed since they were first seen about these matters. I bear in mind also very much the interests of the patients who come to this court and of necessity are cross-examined about what no doubt to them, whatever be the truth of this case, are painful matters and which must have caused concern to those who have the medical care of them."

In the exercise of his discretion he refused to discharge the remaining jurors.

Because of the manner in which Mr. Peet had conducted himself in the jury box, it was very properly decided by the Director of Public Prosecutions, following the conviction of the appellants, that a statement should be taken from Mr. Peet as to his involvement with the other three jurymen, in particular what happened following his discharge. In a written statement, which was put before the Court of Appeal, Mr. Peet confirmed that after his discharge he had given three members of the jury a lift back to Newark, and that "during the journey we discussed the case and also how it came to light about my wife working at Balderton Hospital." Mr. Peet returned the next day to Nottingham, to take his wife and son shopping. Having left them, he went to the court, arriving about 12.45 p.m. However, the summing up had been concluded and the jury had retired at 10.35 a.m. He was told by a representative from Rampton that the jury were unlikely to be back before 2.30 p.m., and in the course of the conversation he expressed the opinion that the defendants would be found guilty. He returned to the court about 1.45 p.m., spoke to a lady who appears to have been a solicitor's clerk, and told her that he had been a bit upset at having been discharged from the jury. He told her that in his view the defendants would be found guilty. He stayed waiting in court until about 4.00 p.m. but was told that the

A verdict would not be until 5.00 p.m. He went back to his car because he had told his son that he would be in the car park at 4.30 p.m. He then returned to the court at 5.00 p.m. and waited until the jury gave their verdict at 5.17 p.m.

The Court of Appeal [1985] Q.B. 771 having read Mr. Peet's statement quoted the description of the discussion during the journey back to Newark with the three members of the jury following Mr. Peet's B discharge. May L.J. giving the judgment of the court then made this comment, at p. 788:

> "Other parts of this statement made it quite clear that Mr. Peet had formed a clear view about the guilt of the appellants but nothing to suggest that he had expressed this view to the three juror passengers in his car when he was giving them a lift home on the last occasion. C Nevertheless, on all the material that there is before us we think we must conclude that in the course of that journey he did do just that."

It is common ground that the judge applied the wrong test for the exercise of his discretion. Moreover, he did not have the information as to what in fact had happened on the journey back to Newark which the D Court of Appeal concluded, and in my judgment rightly concluded, involved the discussion of the case despite the judge's injunction to the contrary. It fell to the Court of Appeal, as it does to your Lordships, to ask themselves whether in all the circumstances they were satisfied that the verdict was safe and satisfactory. The Court of Appeal were so satisfied, the substance of their judgment on this point being expressed E in these terms at p. 790:

> "The three jurors to whom Mr. Peet gave the final lift home had been specifically warned by the judge immediately after Mr. Peet had been discharged that they should not talk to him about the case, just as no doubt they had been warned on earlier occasions. It is quite true that these jurors did not comply with that warning and F direction from the judge and their failure to do so is to be deplored. Nevertheless we do not think that in the circumstances there is any realistic chance that those three jurors, or any of them, carried with them into the deliberations of themselves and their fellow jurors, when the judge finished his summing up the following morning, any prejudice or bias which they had acquired from Mr. Peet the afternoon before. We do not forget that the convictions in this case G were by majority verdicts reached after the jury had been out considering their verdicts for over 5½ hours. We think this is readily explicable by the nature of the evidence which the jury had heard, and by the type of witness by whom that evidence had been given, and about whom and their evidence the judge had so fully warned the jury in the course of his summing up."

H It may well be that Mr. Peet, who apparently during the greater part of the trial had been expressing to his fellow jurors and in particular the three jurors whom he drove to and from court his firm view that the defendants were all guilty, did not in the conversation in his car after his

discharge, add any further strength to the opinion which he had been expressing. However, in the circumstances of this case I find myself unable totally to discount the likelihood of such a possibility. Mr. Peet was clearly very concerned that the defendants should be convicted. As the trial judge appreciated, there was the real possibility that Mr. Peet in the course of his conversations with his wife may have heard things which it would be better if he had not. Mr. Peet was clearly frustrated by being discharged from the jury, despite the very courteous terms in which this was done by the judge. Knowing that he would no longer be able to influence the decision of the jury, he could well have used the journey home as the final opportunity to achieve the outcome of the trial which he thought was right. He may have done this in imparting information which he had intended to reserve until the conclusion of the summing up and after the retirement of the jury when all would be present or he might have only re-stated his views but with added emphasis. What the three jurors were discussing, or being subjected to, was the assertion by a biased, but an ex-fellow juror, of the necessity to convict.

I therefore have a lurking doubt, that justice may not have been done, which makes me conclude that the verdict was unsafe. With some reluctance I find myself unable to agree with the Court of Appeal on this particular aspect of the first of the appeals. Accordingly, I would allow the appeals of Spencer, Ball, and Mason, and dismiss the appeals of Smails, Ball, and White.

The House of Lords, having answered the certified question, as amended, in the affirmative declared that

"(1) while it may often be convenient to use the words 'danger' or 'dangerous', the use of such words is not essential to an adequate warning so long as the jury are made fully aware of the dangers of convicting on such evidence; and (2) *Reg. v. Beck* [1982] 1 W.L.R. 461, was rightly decided and in a case which does not fall into the three established categories and where there exists potential corroborative material, the extent to which the trial judge should make reference to that material depends on the facts of each case and the overriding rule is that he must put defence fairly and adequately."

Certified question, as amended, answered in affirmative.
Declarations accordingly.
Costs of defendants and Crown out of central funds.

Solicitors: Tracey Barlow Furniss & Co., Worksop; Director of Public Prosecutions.

C. T. B.

[PRIVY COUNCIL]

NOLA CHANDROUTIE . . . . . APPELLANT

AND

LUTCHMIE DEVI GAJADHAR . . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO]

1986 July 28; Nov. 3

Lord Keith of Kinkel, Lord Brightman, Lord Templeman, Lord Griffiths and Lord Goff of Chieveley

Partnership—Dissolution—Undistributed assets—Dissolution by death—Deceased partner's wife wrongfully assuming possession of all partnership assets—Action by surviving partner against wrongdoer to enforce claim to half share in assets—Whether proceedings properly constituted—Whether partnership assets to be valued at date of realisation or at deceased partner's death

A widow and her son ran a grocery business in Trinidad in partnership. In 1973 the son and his wife, the defendant, ejected the widow and her daughter from the premises and carried on the business themselves. The son died in April 1975 and thereafter the defendant conducted the business on her own account. No grant of representation to his estate was made. By writ of summons dated 24 January 1978 the widow commenced proceedings against the defendant in the High Court of Trinidad and Tobago claiming, inter alia, a declaration that the widow was entitled to one half share of the business and property, a tracing order to determine what if any property had been purchased out of the profits of the business, an account of all credits, property and effects belonging to the business at the son's death and since then, and payment to the widow of what was due to her. At the hearing it was submitted on behalf of the defendant that there was no case for her to answer because the action should have been brought against the son's personal representative. The judge ruled against that submission and made the declaration and orders sought by the widow. The Court of Appeal dismissed the defendant's appeal but varied the judge's declaration by substituting a declaration that the widow was entitled to one half share of the value of the partnership as that value stood at the son's death. After the widow's death her daughter was substituted as plaintiff.

On the defendant's appeal to the Judicial Committee:—

Held, dismissing the appeal but restoring the judge's declaration, that the partnership between the widow and her son was dissolved at the date of his death, whereupon she and his estate were each entitled to a half share of the partnership assets which the widow as surviving partner was under a duty to realise and to divide the net proceeds between them; that where partnership assets were wrongfully in the possession of a third party a surviving partner could institute proceedings against that third party without joining in the action the personal representative of the deceased partner, and so in order to enforce her claim to a half share in the assets of the partnership the widow had properly sued the defendant who was withholding

them; and that, despite the delay between the son's death and the commencement of the proceedings against the defendant by the widow, she had a right to a half share of the partnership assets valued at the date of their realisation, thereby including any intermediate profits, and not merely a right to a half share of the assets valued at the son's death together with interest (post, pp. 151D–E, 153C–D, G—154D).

Barclays Bank Trust Co. Ltd. v. Bluff [1982] Ch. 172 approved.

Decision of the Court of Appeal of Trinidad and Tobago varied.

The following case is referred to in the judgment of their Lordships:

Barclays Bank Trust Co. Ltd. v. Bluff [1982] Ch. 172; [1982] 2 W.L.R. 198; [1981] 3 All E.R. 232

No additional cases were cited in argument.

APPEAL (No. 38 of 1985) with leave of the Court of Appeal of Trinidad and Tobago, by the defendant, Nola Chandroutie, from the judgment of the Court of Appeal of Trinidad and Tobago (Hassanali, Braithwaite and Bernard JJ.A.) given on 17 February 1984 dismissing her appeal from the judgment of Des Iles J. delivered on 9 February 1981 in the High Court, whereby he granted the plaintiff widow, Basdabie Maharaj, the relief claimed. The Court of Appeal varied the judge's declaration that the widow was entitled to one half share of the value of the partnership business by substituting a declaration that she was entitled to one half share of the value of the partnership as that value stood on 11 April 1975. On 1 June 1984 Persaud J. ordered that the respondent, Lutchmie Devi Gajadhar, be substituted as plaintiff in place of the widow, who had died.

The facts are stated in the judgment of their Lordships.

Fenton Ramsahoye S.C. (of Trinidad and Tobago Bar) and *Mark Strachan* for the defendant. The main question is whether the action was properly constituted.

The widow and her son ran a business in partnership from 1953 until 1973, when the widow and her daughter Lutchmie were turned out and the business was run by the son and his wife (the defendant). The son died in 1975 and by his will he appointed as his executor the Bank of Nova Scotia and he left all his property to the defendant and their four children in equal shares. The plaintiff entered a caveat, and so no grant of representation was taken out and the son's property became vested in the administrator general of Trinidad and Tobago by virtue of section 10(4) of the Administration of Estates Ordinance (Laws of Trinidad and Tobago, 1950 ed., c.8, No. 1).

In 1978 this action was commenced by the widow against the defendant seeking, inter alia, a declaration that the widow was entitled to one half share of the business and property purchased from the business. At the close of the widow's case counsel for the defendant submitted that there was no case to answer because the action ought to

A have been brought against the son's personal representative, but the judge ruled against that submission.

The widow's action was contrary to all established principles, and it was wrong for the widow to bring proceedings against the defendant in order to bind the son's estate. If an order was made against the defendant for accounts to be taken and money paid to the widow, and to do so real estate had to be sold, the defendant would be unable to B convey a good title to a purchaser. Although the son and the defendant had been carrying on the business together, once he died she had no control over the real estate, stock in trade or cash in the bank.

The defendant was not correctly named as a defendant, and it should have been the son's legal personal representative. The widow should have applied for the appointment of an administrator ad litem, and the C court would have appointed someone who could have been sued. Under section 30 of the Wills and Probate Ordinance (Laws of Trinidad and Tobago, 1950 ed., c.8 No. 2) the administrator general could have been asked to apply for probate. The widow was seeking a partnership account and a declaration that the son was her partner. In English law such a declaration has never been granted or account ordered except where the legal personal representative of the deceased partner was a D party to the proceedings. Despite the caveat lodged by the widow the court had jurisdiction to make a limited grant of probate, and so the action could have been brought against the son's personal representative.

The judge's finding that the widow and son had carried on the business in partnership and that the widow was entitled to a half share is no longer disputed by the defendant. The Court of Appeal having found E that the partnership was dissolved on the son's death were justified in deciding that the widow's half share should be valued as at the date of the son's death. If someone wrongfully carries on a business after dissolution of a partnership, that is equivalent to the conversion of moneys owed at the date of dissolution, and so compensation should be the amount owing at that date plus interest.

Strachan following. The statement of claim was a form of uneasy F marriage between the two types of relief claimed, because the relief sought was typical of that which a partner would seek but the parties were not partners and in the body of the claim there was a form of action with some of the characteristics of a claim against an intermeddler in the deceased's estate. The taking of possession alleged against the defendant could be said to be intermeddling in the deceased's estate so G as to justify the widow, as a creditor of the deceased's estate, bringing an action against the defendant. The Court of Appeal regarded it as a case of that nature. It is not disputed that there was some relief which the widow could have claimed against the defendant, but it is submitted that having regard to the relief pleaded a stranger to the partnership was not the proper defendant. It was an unusual claim which should have been brought against the son's personal representative. Any declaration H made in these proceedings would not be binding on the son's estate.

Where a partner seeks a partnership account it is necessary for all the partners to be joined in the proceedings. The widow's claim was not for part of the goods in the defendant's possession, but for half the

partnership assets, and she was not entitled to that relief against the defendant.

Dalchan Gajadhar (of the Trinidad and Tobago Bar) for the substituted plaintiff. [Submissions were required only in relation to the Court of Appeal's variation of the judge's order.] The judge's order should be restored. Since 1975 the defendant, a stranger, has been in possession of all the partnership assets to the exclusion of the widow, who was the surviving partner. In giving judgment in the Court of Appeal Braithwaite J.A. said that there had been inordinate delay by the widow in bringing the action, but he failed to take into account her age and all the circumstances. Even if it could be said that she had delayed from 11 April 1975 to 24 January 1978, it would not be just and equitable that a stranger should be able to benefit from the fruits of all the partnership assets from 1975 to the present. The judge's order would adequately meet the circumstances of the case in all fairness to both parties, and there would be no difficulty in carrying out that order. If property had to be sold it could be conveyed on the order of the court. The son's estate would be entitled to half the proceeds of realisation of the partnership assets, and his personal representative would not have to be a party to the winding up of the partnership business.

Ramsahoye S.C. in reply. The Court of Appeal took the view that when the son died the partnership was dissolved and the widow's action should have been brought immediately. They considered that it would be fair to value the widow's half share as at the date of the son's death together with interest, and they were entitled to reach that conclusion.

Cur. adv. vult.

3 November. The judgment of their Lordships was delivered by Lord Brightman.

The principal question which arises on this appeal from the Court of Appeal of Trinidad and Tobago is whether a surviving partner was entitled to bring proceedings to enforce her claim to a share of the partnership assets, against a third party who had assumed possession of those assets, without joining in the proceedings some person to represent the estate of the deceased partner. A subsidiary question is whether such surviving partner is entitled to receive her share of the net realised partnership assets as at the present day, with intermediate profits, or whether she can be required to accept a valuation figure as at the date of the death of the deceased partner plus interest to date.

The original plaintiff in the action was Basdabie Maharaj, whom it will be convenient to call "the widow." She lived with her husband Bissoondial Maharaj in a shop-house in Riverside Road, Fonrose Village, Poole in the island of Trinidad. The shop-house was the family home and also a shop for the sale of dry goods, rum and medicinal substances to the people of the village. The shop belonged to her husband, but as he had other business interests the widow largely ran it on his behalf. They had four children, one of whom was a son Ramnanan, usually known as "Tan," and another of whom was a daughter Lutchmie Devi.

A The husband died in June 1953. By his will he gave "the lot of land with the shop-house and all stock in trade and things thereto belonging situate at Riverside Road," together with all cash in the bank, to the widow and Tan, clearly expecting them to continue the running of the business as their joint venture, as indeed they did. The business prospered. In 1962 the family, then consisting of the widow, Tan and his wife Nola who is the defendant in these proceedings, and Lutchmie B moved to another shop-house in St. Croix Road, Princes Town. The business continued to do well. Ten years later the business was moved to its present premises at Tramline Street, Princes Town.

Unfortunately in 1973 family relationships deteriorated. The defendant told Tan that he would have to choose between his mother and herself. In the outcome, in July 1973, the widow and Lutchmie were turned out C of the home and Tan and the defendant appropriated the business to themselves. According to the defendant's evidence, it was carried on as a partnership business by the two of them. At this time Tan was about 40 years of age, and the widow about 71.

In April 1975 Tan died, and the defendant thereafter ran the business on her own account. Tan is said to have left a will appointing the Bank of Nova Scotia to be his executor, and leaving all his property to the D defendant and their four surviving children in equal shares. However, no will has been proved and no representation has ever been taken out to Tan's estate.

On the assumption that a partnership at will existed beween the widow and Tan, the strict legal position at the death of Tan was that the partnership was then dissolved (if it had not previously been dissolved E by conduct) and the widow as surviving partner had exclusive authority to deal with the assets of the partnership. She had the sole right and the duty to realise the assets, to discharge the liabilities and to divide the net proceeds between herself and the estate of Tan.

On 24 January 1978 the widow issued proceedings against the defendant. This was $4\frac{1}{2}$ years after she had been ousted from the partnership, and almost three years since the death of Tan. By her F statement of claim, which did not follow until almost two years later, the widow claimed that a partnership existed between herself and Tan, which had been dissolved by his death, and that the business had been appropriated by the defendant. The widow claimed a declaration that she was entitled to the whole of the business, or in the alternative to a half share, and also claimed accounts and inquiries appropriate to a G winding up of the affairs of the partnership. Any claim on the part of the widow that she had a *beneficial* interest in the whole of the partnership assets (if such was intended to be made) was unsustainable and was abandoned at the beginning of the hearing.

In her defence, the defendant claimed that the business had belonged to herself and Tan in partnership, and that the widow had no interest whatever therein. She claimed in effect to be entitled to the business as H the surviving partner, subject no doubt to a duty to account to Tan's estate for his half share.

The action came to trial in January 1981 and lasted for 11 days. Counsel for the widow closed his case on day six. Counsel for the

defendant then submitted that there was no case to answer because the action sought to establish the existence of a partnership between the widow and Tan and ought therefore to have been brought against the personal representative of Tan; the defendant was not such a representative. The judge ruled against that submission and the trial continued. He found that a partnership existed in the shop business from the death of Bissoondial until the death of Tan in April 1975, when it was dissolved. The judge made an order in the following terms:

> "1. A declaration that the plaintiff, Basdabie Maharaj, is entitled to one half share of the business carried on as a grocery known as 'Ramnanan Gajadhar Wholesale and Retail Merchants' situate at Tramline Street, Princes Town, together with all property purchased from the said business. 2. A tracing order to determine what if any property has been purchased out of the profits of the said business. 3. An account of all the credits property and effects belonging to the business at the death of Ramnanan Gajadhar. 4. An account of the profits of the said business since the death of the said Ramnanan Gajadhar. 5. An account of what is due to the plaintiff under and by virtue of the aforesaid declarations. 6. Payment to the plaintiff under and by virtue of the aforesaid. 7. An injunction restraining the defendant from disposing of or otherwise dealing with the aforesaid business or property to the detriment of the plaintiff."

This order corresponded with the relief which was sought by the widow in her statement of claim.

The defendant appealed. In her notice of appeal she challenged the finding of a partnership between the widow and Tan, and also asserted that the action involved a claim against property held by the deceased Tan and could not be heard and determined in the absence of a legal personal representative of his estate.

The judgment in the Court of Appeal was delivered by Braithwaite J.A., with whom Hassanali and Bernard JJ.A. concurred. The judge said that there was evidence of an overwhelming nature both oral and documentary to support the findings of the trial judge and he was in agreement that there was a partnership between the widow and Tan. On the procedural issue he considered that the defendant's status was that of an executor de son tort in relation to Tan's share in the partnership business, and that she was liable as such to account for the assets of which she had taken possession; she was therefore properly sued in her personal capacity and was liable to the widow to account for the latter's half share of the partnership assets. As regards the relief to which the widow was entitled, he said:

> "It would appear that in making his order, the judge did not address his mind to the operation of the provisions of section 35(1) of the Partnership Act, c.81:02 whereby the partnership dissolved on the date of the death of Tan, that is to say, on 11 April 1975. It was open to the [widow] to bring the instant action any time after that event; but she did not bring it until 24 January 1978, and there has been no explanation for the inordinate delay. In the circumstances I would not order the [defendant] accountable to the [widow]

A beyond that date. I would vary the judge's declaration that the [widow] is entitled to one half share of the value of the partnership business and would substitute therefor a declaration that the [widow] is entitled to one half share of the value of the partnership as that value stood on 11 April 1975."

The widow died shortly after the order of the Court of Appeal was B made, and her daughter Lutchmie was substituted in her place.

The defendant now appeals to their Lordships with the leave of the Court of Appeal. In opening the appeal the defendant's counsel conceded that he could not challenge the conclusion that the widow and Tan were partners in the shop business and he relied on the procedural point which is expressed as follows in the printed case:

C "That the widow wrongly instituted proceedings against the [defendant], when such proceedings should properly have been brought against the proper legal representative of the estate of [Tan]."

In the opinion of their Lordships there can be no doubt that the widow was entitled to sue the defendant to enforce her rights so far as D they had been usurped by the defendant. It is not in dispute that Tan and the defendant de facto conducted the shop business as from the widow's expulsion on 17 July 1973, and that the defendant conducted the business on her own account as from the death of Tan on 11 April 1975. As their Lordships have already indicated, the de jure position was that the partnership between the widow and Tan was dissolved on 11 April 1975 (if not dissolved earlier by inference) and that Tan's estate E was thereupon entitled to a half share of the net proceeds produced by a winding up of the partnership business; the right and duty of the widow as between herself and Tan's estate was to get in the partnership assets and to realise them for the benefit of both. The partnership assets, however, were all held by the defendant, and there can therefore be no doubt that the widow was entitled to call upon the defendant to F deliver up the assets to her for the purpose of realisation. That would, however, have been a somewhat unrealistic course having regard to the age of the widow and the fact that she had been out of possession for over four years. The appointment of a receiver would have been preferable. But an action against the personal representative of the estate of Tan alone, had one been constituted, would have been a totally unsatisfactory proceeding since Tan's estate possessed no G partnership assets and was not entitled to possess any. All that Tan's estate was entitled to was a share of the proceeds of realisation. An action against such a personal representative would only have established the existence of a partnership between the widow and Tan, and would not have recovered the assets of the partnership, all of which were wrongly held by the defendant. In these circumstances it appears to their Lordships beyond dispute that the defendant was a necessary and proper H party to any proceedings brought by the widow for the purposes of enforcing her rights as surviving partner. Admittedly the finding in the present proceedings that a partnership existed between the widow and Tan is not in theory binding on the estate of Tan, but that has no

bearing whatever upon the duty of the defendant to account to the widow; as between the defendant and the widow, the widow was the survivor of a partnership which existed between herself and Tan, and the defendant was in wrongful possession of the assets of that partnership.

Their Lordships respectfully differ from the Court of Appeal in their conclusion that the delay of $2\frac{3}{4}$ years between the death of Tan and the issue of a writ deprived the widow of her right to a half share of the present realisable value of the partnership assets or to an account of profits. Where a partnership is dissolved by the death of one partner and the surviving partner continues the business for some years without realisation, the estate of the deceased partner prima facie remains entitled to an appropriate share of the proceeds of sale of the assets and is not confined to a share of the value of such assets as at the date of death: see *Barclays Bank Trust Co. Ltd. v. Bluff* [1982] Ch. 172, with which decision their Lordships are in agreement. A fortiori a partner who has been wrongly ousted from the partnership by his co-partner, who continues to carry on the business, is entitled to the appropriate share of the proceeds of realisation and is not confined to the value of the assets at the date of ouster or the later death of the wrongdoing co-partner. There are no facts pleaded by the defendant in her defence, and there is no finding of fact of the judge, nor is any point of law relied upon, which can lead to a conclusion that the widow has lost her ordinary partnership right to a share of the proceeds of realisation, thus reflecting the current value of the assets, or that she has lost her right to an account of profits.

A sale of a partnership business in accordance with the rights of an outgoing or deceased partner is usually contrary to the best interests of the person currently running the partnership business. It is to be hoped that wise counsels will prevail and that the defendant will make a fair and realistic offer to the widow's estate which will avoid the necessity for accounts to be taken and the business to be realised.

Their Lordships will dismiss the appeal, but will restore the form of order made by the trial judge. The defendant will pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors: Ingledew, Brown, Bennison & Garrett; Philip Conway Thomas & Co.

S. S.

[PRIVY COUNCIL]

COMMISSIONER OF INLAND REVENUE . . . APPELLANT

AND

CHALLENGE CORPORATION LTD. . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND]

1986 July 21, 22; Oct. 20

Lord Keith of Kinkel, Lord Brightman, Lord Templeman, Lord Oliver of Aylmerton and Lord Goff of Chieveley

New Zealand—Revenue—Income tax—Taxpayer purchasing loss making company—Taxpayer's group of companies claiming to deduct company's loss from assessable income of group—Whether tax avoidance—Whether arrangement void for income tax purposes—Income Tax Act 1976, ss. 99(2)(a), 191(5)

In order to reduce the incidence of income tax of the group of companies to which the taxpayer and its subsidiaries belonged the taxpayer in February 1978 purchased all the issued share capital in a company which had sustained a tax deductible loss of $5·8 million in the year of income ending 31 March 1978. The purchase price was $10,000 or 22½ per cent. of the company's tax loss allowed to be deducted from the assessable income of the group, whichever was the greater amount. As the company had become part of the group and the requirements of section 191 of the Income Tax Act 1976[1] had been fulfilled, the subsidiary companies pursuant to section 191(5) elected for the company's loss to be deducted from their own assessable income for that year thereby reducing their tax liability by $2·85 million. However, in raising the assessment of the joint liability of the group for the year the commissioner disallowed deduction of that loss on the ground that the arrangement for the purchase of the company constituted tax avoidance within section 99(2)(a) and was void as against him for income tax purposes. The taxpayer objected to the assessment but the commissioner disallowed the objection. On a case being stated in the High Court of New Zealand the judge held that the commissioner had acted incorrectly in disallowing the deduction claimed, and the Court of Appeal by a majority upheld that decision.

On the commissioner's appeal to the Judicial Committee: —

Held, allowing the appeal (Lord Oliver of Aylmerton dissenting), that, although in certain circumstances section 191 permitted a loss incurred by a company in a specified group of companies to be set off against the assessable income of another company in the group, the general anti-avoidance provisions in section 99 also applied so as to render void for income tax purposes any agreement entered into for the purpose of reducing the liability of a group of companies for income tax; and that, therefore, since the loss had been sustained by the company before it became a member of the group, and the agreement to

[1] Income Tax Act 1976, s. 191: see post, pp. 162F—163H.
S. 99: see post, p. 162A–E.

purchase the company had been made by the taxpayer solely for the purpose of reducing the group's liability to pay income tax without any reduction in income being suffered or any loss or expenditure being incurred by the taxpayer or its subsidiaries, it was an arrangement for tax avoidance which was void as against the commissioner under section 99(2); and that, accordingly, in assessing the group's joint liability for income tax the commissioner had acted correctly in refusing to allow the company's loss to be deducted from the group's assessable income (post, pp. 164C–D, G—165A, B–D, G, 168E–G).

Per curiam. Section 99 of the Income Tax Act 1976 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability (post, p. 168D–E).

Decision of the Court of Appeal of New Zealand reversed.

The following cases are referred to in the judgment of their Lordships:

Black Nominees Ltd. v. Nicol (1975) 50 T.C. 229

Chinn v. Hochstrasser [1981] A.C. 533; [1981] 2 W.L.R. 14; [1981] 1 All E.R. 189, H.L.(E.)

Inland Revenue Commissioners v. Burmah Oil Co. Ltd. (1981) 54 T.C. 200, H.L.(Sc.)

Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1, H.L.(E.)

Ramsay (W. T.) Ltd. v. Inland Revenue Commissioners [1979] 1 W.L.R. 974; [1974] 3 All E.R. 213, C.A.

The following additional cases were cited in argument:

Keighery (W. P.) Pty. Ltd. v. Federal Commissioner of Taxation (1957) 100 C.L.R. 66

McKay v. Commissioner of Inland Revenue [1973] 1 N.Z.L.R. 592

Stubart Investments Ltd. v. The Queen (1984) 10 D.L.R. (4th) 1

Appeal (No. 22 of 1986) with leave of the Court of Appeal of New Zealand by the appellant, the Commissioner of Inland Revenue, from the judgment of the Court of Appeal of New Zealand (Cooke and Richardson JJ.; Woodhouse P. dissenting) given on 19 December 1985 dismissing an appeal by the commissioner from the judgment of Barker J. given in the High Court of New Zealand on 8 August 1984 whereby in answer to the question in the case stated it was decided that in calculating the income of the respondent taxpayer, Challenge Corporation Ltd., for the income year ended 31 March 1978 the commissioner had acted incorrectly in disallowing the loss claimed by the taxpayer to be set off against the joint income of the Challenge group.

The facts are stated in the judgment of their Lordships.

D. P. Neazor Q.C., S.-G., and *P. J. H. Jenkin* (both of the New Zealand Bar) for the commissioner. The principal question is whether the general anti-avoidance provisions in section 99 of the Income Tax Act 1976 apply so as to render void an arrangement designed to take advantage of a loss spreading provision in section 191 in circumstances brought about by the taxpayer itself. The effect of the decision of the

majority of the Court of Appeal, that one should look simply at section 191 and not at section 99, is too blinkered an approach.

The arrangement whereby the taxpayer purchased all the shares of a company which had sustained a tax loss for a purchase price of $10,000 or 22½ per cent. of the company's tax loss allowed to be deducted from the assessable income of the group of companies to which the taxpayer belonged, whichever amount was the greater, was clearly an arrangement for the purpose of tax avoidance within section 99. [Further argument was not required.]

R. L. Congreve and *R. A. Green* (both of the New Zealand Bar) for the taxpayer. The key issue is whether there was tax avoidance. It is not denied that there was a tax change, but that does not constitute tax avoidance in every case and it was not so here.

Section 191 establishes a statutory scheme whereby a permanent change of shareholding is not tax avoidance even if it results in a change in tax liability. Whenever there is a different grouping of companies section 191 applies. The section refers specifically to changes in shareholding of a temporary nature, and the commissioner is given power to disregard such changes if the purpose is tax avoidance. The legislature must therefore have intended that a permanent change of shareholding would be acceptable and would not be tax avoidance. There is no room for section 99 to apply where a particular section has its own anti-avoidance provision. The wording of the anti-avoidance provisions in section 191(1)(c)(i) is similar to that in section 99, and so the inference is that alterations in shareholding of a permanent nature do not constitute tax avoidance. The provisions with regard to temporary alterations would be unnecessary if section 99 applies.

The majority of the Court of Appeal held that a change in the incidence of tax was not necessarily tax avoidance even if made in order to seek to save tax. Since the arrangement entered into by the taxpayer was one contemplated by the Act of 1976 it was not tax avoidance. The reasoning of Richardson J. in the Court of Appeal is adopted.

The concept of tax avoidance, which is a technical term, requires consideration of other sections of the Act of 1976 not merely section 99. There can be tax saving consequences which are contemplated and prescribed by the Act in specific factual situations, and section 191 relates to one of those situations. The agreement made by the taxpayer did not purport to alter the incidence of tax in the sense in which that phrase is used in section 99, because it only purported to reduce tax liability in a manner contemplated by the Act. The test under section 99 is not whether the taxpayer did something which had the effect of reducing the incidence of income tax, but whether the act of the taxpayer altered the incidence of income tax as contemplated by the Act in various tax situations whereupon it would not constitute tax avoidance. The legislature contemplated permanent alterations in the shareholding of companies in a group, and therefore such alterations are not tax avoidance.

A group may be created in a number of different ways, and it cannot be assumed that they arise and operate only in a business matrix. The simplest way a group can be formed is by one company buying all the

shares in another company. Section 191 contemplates that that may happen, and if it does that cannot be characterised as tax avoidance, and even though there is a change in the incidence of income tax section 99 does not apply.

Section 191 concentrates on grouping by shares being held in a certain way, and the commissioner is directed to disregard share transfers of a temporary nature. The issue is whether transactions coming within section 191 run the risk of attack under section 99 if an incidental purpose is tax avoidance. A taxpayer may be motivated by both business and tax-saving purposes. Section 191 is concerned with the status of companies on the last day of the income year in question. The section adopts a concept of specified shareholding, and changes in proportions mean changes in shareholding. The commissioner has to look at the proportions, and he has now conceded that the requirements of section 191 have been fulfilled. The legislature directed its mind to changes in shareholding, and the question is whether there was a reasonable intention on the part of the legislature that permanent changes should also be liable to challenge under section 99. The significant aspect is the fact that section 191 refers to status on a certain date, and antecedent transactions, unless they are of a temporary nature, are irrelevant because tax consequences follow if a particular status exists at the material time. In enacting section 191 the legislature clearly incorporated the anti-avoidance formula in section 99, but only in a limited context. There obviously can be activities permissible under section 191 which would be tax avoidance under section 99, and so section 99 cannot prevail.

The taxpayer purchased all the issued share capital of the loss-making company, and so there was an alteration in the proportions of the paid-up capital of that company and also of the taxpayer. Regard has to be had to the proportions of shareholding in the various companies at the end of the year of income to see if they comprise a group within section 191. If the arrangement in question is void under section 99 it is only void for tax purposes, and the loss-making company still remains in the group to which the taxpayer belongs.

The scheme provided by section 191 is artificial and complex, and is referable only to taxation. For that reason one cannot import into it any gloss or refinement that the group should be formed in a particular way. The section is not concerned with the activities of companies during the tax year, but only with the state of affairs existing at the end of the tax year. It identifies that state of affairs with considerable particularity. It does not import concepts of natural or commercial groups. Before section 99 can apply there must be tax avoidance, namely alteration of the tax consequences contemplated by the Act of 1976, and by its very nature section 191 dictates the conclusion that a permanent transfer of shares bringing about a group cannot be tax avoidance. The true purpose and effect of the Act is to give section 191 a meaning according to its terms, and if a state of affairs exists at the end of the tax year whereby a group is constituted that is the end of the matter.

The amendments made to the predecessor of section 99 of the Act of 1976 have resulted in section 99 being extremely wide, and so it is

A important to look at other sections of the Act to determine whether or not there has been tax avoidance. The legislature cannot have intended that a whole range of transactions which have a business purpose but which also have tax consequences should be struck down by section 99. If the appeal succeeds, a seven year covenant, or a settlement of capital, would be void under section 99 if entered into for various purposes or effects one being reduction in the tax payable by the covenantor or B settlor. There must be compromise between the wide provisions of section 99 and the particular provisions of the Act which confer tax rights or consequences.

McKay v. Commissioner of Inland Revenue [1973] 1 N.Z.L.R. 592 can be distinguished. In that case there was a series of transactions not amounting to ordinary business or family dealing which were designed to C achieve an economic result, whereas in the present case the result was brought about by a single act and section 191 conferred tax rights in such circumstances except where there was only a temporary change in shareholding. This is an extreme case because the taxpayer acquired all the shares in the company, and tax avoidance was not merely an incidental purpose or effect. However, if the commissioner is right, any transaction can be struck down if one of the objects is tax avoidance D even though there are also real commercial objectives. Although the taxpayer deliberately sought a perceived tax consequence, that is not tax avoidance in the traditional sense. Section 191 provides for the fiscal consequences of a certain situation and therefore it is not tax avoidance if the taxpayer brings itself within that situation. An important factor is the anti-avoidance provision in section 191 itself. Section 99 applies E where there is not one transaction but where by a series of transactions a taxpayer gains a tax advantage. The particular tax consequence can be challenged under section 99 if it is not derived from a specific statutory provision.

Reliance is placed upon *W. P. Keighery Pty. Ltd. v. Federal Commissioner of Taxation* (1957) 100 C.L.R. 66. In that case the High Court of Australia rejected any application of section 260 of the Income F Tax and Social Services Contribution Assessment Act 1936–1952 (the equivalent of section 99 of the New Zealand Act prior to the 1974 amendments) in the particular circumstances. [Reference was also made to *Stubart Investments Ltd. v. The Queen* (1984) 10 D.L.R. (4th) 1.]

If a transaction is permissible under the other provisions of the Income Tax Act 1976 it is not tax avoidance within section 99.

G *Neazor Q.C., S.–G.* In reply. What is attacked by the commissioner in this case is a transaction by which the taxpayer placed itself in a position to take advantage of the provisions of section 191. There is an element of degree necessarily involved in the application of section 99. The legislature intended the matter to be dealt with on a case by case basis, and left the boundaries of the section for the courts to determine. This transaction is clearly identifiable as an arrangement for the purpose H of tax avoidance.

Section 99 is a stronger anti-avoidance provision than its predecessor, and that shows the importance attributed to it by the legislature. The new section does not make ordinary business purposes or family dealing

irrelevant, and the absence of such may be a strong indicator that an arrangement was for the purposes of tax avoidance and so it is void. If tax avoidance is merely an incidental purpose or effect it is permissible, and so the particular transaction must be scrutinised to see whether or not tax avoidance is incidental. Where securing a tax advantage can be described as being an end in itself it is clearly caught by section 99. The non-tax saving object has to outweigh the tax-saving purpose if section 99 is not to apply. There is room for evaluation of the purposes by reason of the words "merely incidental" in section 99(2)(b). Section 99 is very wide and the merely incidental provision is the only escape from it unless the legislature showed its intention that section 99 should not apply in certain circumstances.

There are identifiable areas in which the legislative intention must be taken to be that section 99 will not override specific provisions in the Act of 1976, and so taking advantage of those provisions will not attract the operation of section 99. No difficulty arises where the legisalture seeks to promote certain economic incentives, because if in order to take advantage of the incentives a taxpayer arranges his affairs in a way which the legislature is encouraging, section 99 will not apply to deprive him of such benefits. However, section 191 does not come within that category. The section only provides an opportunity for relief in specified circumstances, and there is a distinction between encouraging and permitting a taxpayer to act in a certain way. The purpose of section 191 was correctly described by Woodhouse P. and Richardson J. in the Court of Appeal. Section 191 contemplates changes within a group to enable losses to be spread, and not that a company should be able to acquire foreign losses with impunity.

There is no basis for any presumption that compliance with section 191 must make such transactions immune from section 99. Section 99 cannot prevent section 191 from having its designed effect, but that merely means that alterations in proportions will not be caught unless they are temporary. To alter such proportions there must be some shareholding in the first place. If before the transaction one company has no interest in another company which it acquires, section 99 may nevertheless apply depending upon whether the acquisition is purely for tax-saving purposes or whether it can be seen to have commercial reality. Once section 99 applies, section 191 can have no impact on the situation, and if the arrangement is for tax avoidance it is void as against the commissioner.

Section 191 contemplates that there may be alterations in proportions to bring about a desired result. It is consistent with the purposes of both sections 191 and 99 for acquisitions of shareholding of companies outside a particular commercial group to be open to attack under section 99. A change in proportions is not the same as entering into a group, and it means a change in something already held. Although under section 191 proportions can be changed, section 99 prevents transactions which have no purpose other than making available a loss of which a tax advantage can be taken. The acquisition of shareholding in a company outside an existing group must be able to stand scrutiny under section 99, and that is consistent with section 191.

Section 191(1)(c) existed at the time section 99 was enacted. Accordingly the legislature must have intended that permanent changes would be dealt with under the general anti-avoidance provisions. The central thrust of the subsection is the proportions in which persons hold the paid-up capital of the group, and it is dealing with inter-group arrangements. It presupposes holdings by the same people, and therefore for an alteration in proportions there must be an initial holding. A change from a person having no voting power to having a certain percentage voting power cannot be a change in proportion. The draftsman's mind was not directed to a complete substitution of one group of shareholders in a company for the original shareholders. The words of section 191 are not apt to cover the transfer of all the paid-up capital from one company to another. The intelligible legislative purpose to be discerned is that the anti-avoidance provisions in section 191(1)(c) are applicable only to temporary changes in shareholding, voting power and title to profits, and that if a company is brought within a new commercial group by total acquisition section 99 is not excluded.

Cur. adv. vult.

20 October. The judgment of the majority of their Lordships was delivered by Lord Templeman.

By an agreement dated 28 February 1978 Merbank Corporation Ltd. ("Merbank") sold to the respondent taxpayer, Challenge Corporation Ltd., the whole of the issued share capital of Perth Property Developments Ltd. ("Perth") at the price of $10,000 or at the price equal to 22½ per cent. of the amount of the tax loss of $5.8 million incurred by Perth which proved to be deductible from the assessable income of the Challenge group of companies, whichever price should prove to be higher.

By section 99 of the Income Tax Act 1976 of New Zealand, any "contract" shall be "absolutely void as against" the appellant Commissioner of Inland Revenue "if and to the extent that, directly or indirectly . . . its purpose or effect" is to reduce "any liability to income tax."

The purpose of the agreement dated 28 February 1978 was to reduce the liability to income tax of the Challenge group of companies by $2.85 million. The agreement is therefore absolutely void against the commissioner to the extent that its effect would enable the tax loss of Perth to be deducted from the assessable income of the Challenge group.

The taxpayer asserts that, notwithstanding section 99, it is entitled to treat the agreement as valid against the commissioner, because section 191 of the Act allows losses to be transferred in certain circumstances between members of a group of companies.

The question is whether, as the commissioner contends, section 191 takes effect as if the agreement did not exist, or whether, as the taxpayer contends, section 191 takes effect as if section 99 did not exist. In the High Court of New Zealand, Barker J. found in favour of the

taxpayer. He was upheld by a majority (Cooke and Richardson JJ.) of the Court of Appeal (Woodhouse P. dissenting). The commissioner appeals to the Board.

Section 99 is headed "Agreements purporting to alter incidence of tax to be void" and, so far as material, provided in the relevant income tax year ended 31 March 1978 as follows:

> "(1) For the purposes of this section—'Arrangement' means any contract, agreement, plan, or understanding (whether enforceable or unenforceable) including all steps and transactions by which it is carried into effect: 'Liability' includes a potential or prospective liability in respect of future income: 'Tax avoidance' includes—(a) Directly or indirectly altering the incidence of any income tax: (b) Directly or indirectly relieving any person from liability to pay income tax: (c) Directly or indirectly avoiding, reducing, or postponing any liability to income tax. (2) Every arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the commissioner for income tax purposes if and to the extent that, directly or indirectly,—(a) Its purpose or effect is tax avoidance; or (b) Where it has two or more purposes or effects, one of its purposes or effects (not being a merely incidental purpose or effect) is tax avoidance, whether or not any other or others of its purposes or effects relate to, or are referable to, ordinary business or family dealings,—whether or not any person affected by that arrangement is a party thereto. (3) Where an arrangement is void in accordance with subsection (2) of this section, the assessable income and the non-assessable income of any person affected by that arrangement shall be adjusted in such manner as the commissioner considers appropriate so as to counteract any tax advantage obtained by that person from or under that arrangement . . . "

Section 191 is headed "Companies included in a group of companies" and, so far as material, provided in the relevant income tax year as follows:

> "(1) For the purposes of this section—(a) Where a nominee of any person holds any paid-up capital, or any allotted shares, or any voting power in a company, or is entitled to a share of profits distributed by a company, that paid-up capital, or those allotted shares, or that voting power, or that title to profits, as the case may be, shall be deemed to be held by that person: (b) Shares in one company held by another company shall be deemed to be held by the shareholders in the last-mentioned company: (c) The proportion of the paid-up capital, and of the nominal value of the allotted shares, and of the voting power, and of the title to profits held by any person in any company at the end of any income year shall be determined by the commissioner; and (i) In determining those proportions, the commissioner shall disregard any alteration in those proportions which, in his opinion, is of a temporary nature and has or purports to have the purpose or effect of in any way—(A) Altering the incidence of income tax; or (B) Relieving

the company or any other company from its liability to pay income tax,—by in either case excluding that company or any other company from, or including that company or any other company in, any group of companies in relation to that income year; . . . (2) Subject to this section, every company included in a group of companies shall be assessable and liable for income tax in the same manner as if it were a company not included in a group of companies. (3) Where, in relation to two or more companies and to any income year,—(a) The aggregate of the prescribed proportions of the paid-up capital, or of the nominal value of the allotted shares, or of the voting power, in each of those companies which is held by the same persons is not less than two-thirds of the paid-up capital, or of the nominal value of the allotted shares, or of the voting power, as the case may be, in each of those companies; or (b) The aggregate of the prescribed proportions of the profits for that income year of each of those companies to which the same persons would be entitled if the profits of each of those companies were distributed by way of dividend at the end of that income year is not less than two-thirds of those profits of each of those companies,—those companies (in this Act referred to as a group of companies) shall, in respect of that income year, be assessed and liable for income tax in accordance with this section. (4) . . . subsection (5) of this section shall apply in any case where, in relation to a group of companies (such group being referred to in this subsection . . . and subsection (5) as a specified group), . . . (a) The same persons held at the end of that income year the whole of the paid-up capital in the same proportions in every company included in the specified group; . . . (5) Where subsection (4) of this section applies to any specified group and to any income year . . . Any loss . . . may, if that company so elects by notice . . . be deducted from the assessable income derived in that income year by such other company or companies included in the specified group as is or are nominated by that company, . . . (7) Where—(a) Any company makes a payment to another company under an agreement providing for the paying company to bear or share in losses or a particular loss of the payee company (being losses or a loss which are deductible under this Act); and . . . (c) Both companies are companies which are included in the same group of companies for the income year corresponding with the income year in respect of which the payment is made; . . . the payment shall be deemed to be assessable income derived by the payee company on the last day of the accounting period in respect of which it is made, and to be deductible by the paying company as if it were expenditure necessarily incurred in the production of assessable income on that day."

Prior to 28 February 1978 Challenge was the parent company of a number of subsidiary companies including the taxpayer subsidiaries which had made assessable profits exceeding $5.8 million. Parent and subsidiaries formed a specified group of companies for the purposes of

section 191. Perth had made a deductible loss of $5.8 million before Perth, by virtue of the agreement dated 28 February 1978, became a member of the Challenge specified group of companies. Subsequently Perth gave notice of election under section 191 transferring Perth's loss of $5.8 million to the taxpayer's subsidiaries which had earned assessable income exceeding $5.8 million and those subsidiaries claimed to deduct Perth's loss from their own assessable income by virtue of section 191(5), thus reducing their tax liability by $2.85 million.

Section 191 was intended to give effect to the reality of group profits and losses. When one member of a group makes a profit of $5.8 million and another member of a group makes a loss of $5.8 million then the reality is that the group has made neither a profit nor a loss and that the members of the group should not be liable to tax. Section 191 in these circumstances is not an instrument of tax avoidance. But in the present circumstances the reality is that the Challenge group never made a loss of $5.8 million. A loss of $5.8 million was made by Perth and that loss fell on Merbank before the taxpayer contracted to buy Perth. Section 191 in these circumstances is an instrument of tax avoidance which falls foul of section 99.

A loss of $5.8 million was made by Perth. Perth was indebted to its parent Merbank in a sum roughly corresponding to the loss made by Perth. As a preliminary to or as part of the arrangement made between Merbank and the taxpayer finalised by the agreement dated 28 February 1978, Merbank in effect wrote off and released the debt of $5.8 million owed by Perth to Merbank. Thus the loss of $5.8 million was sustained by Perth before Perth became part of the Challenge group of companies. The loss sustained by Perth was in fact borne by Merbank. The agreement dated 28 February 1978 transferred to the taxpayer the shareholding of Perth which was valueless. The only purpose of the agreement was to enable control of the tax benefit of Perth's loss to be transferred from Merbank to the taxpayer. Subject to section 99 the assessable income of the taxpayer and the subsidiaries comprising the Challenge group prior to 28 February 1978 could be reduced by the amount of the loss sustained by Perth and suffered by Merbank prior to 28 February 1978. Stripped of pretence, the taxpayer was purchasing the tax benefit of a loss sustained by another taxpayer, Perth. If successful, the taxpayer would obtain a tax advantage of $2.85 million by means of an arrangement and the benefit of that tax advantage would then be divided between the taxpayer and Merbank. A clearer case for the application of section 99 cannot be imagined. If such an arrangement were not caught by section 99 and were recognised by the courts for tax purposes, income tax would only be collected from those profitable companies which failed to come to terms with loss-making companies.

The response of the taxpayer to this analysis is threefold. First, the taxpayer says that section 191 confers a specific exemption on a group of companies which fulfils the conditions set forth in section 191 at the end of an income year. The Challenge group included Perth and satisfied the specified conditions at the end of the income year ended 31 March 1978. Section 99 does not apply where the conditions specified in section 191 are satisfied. That argument cannot be correct. Tax

A avoidance schemes largely depend on the exploitation of one or more exemptions or reliefs or provisions or principles of tax legislation. Section 99 would be useless if a mechanical and meticulous compliance with some other section of the Act were sufficient to oust section 99. Richardson J., giving judgment in the Court of Appeal in favour of the taxpayer, nevertheless recognised that "section 99 would be a dead B letter if it were subordinate to all the specific provisions of the legislation."

Secondly, the taxpayer says that section 191 contains its own particular tax avoidance provision and by necessary implication excludes the general anti-tax avoidance provisions of section 99. The provisions of section 191(1)(c)(i) enabled the commissioner to disregard any temporary alteration in the shareholding or constitution of a company C where the purpose or the effect of the alteration is tax avoidance. Therefore, it is said, Parliament must have intended that section 99 should not apply to a group of companies seeking to operate section 191. Parliament must have intended that any permanent form of tax avoidance or any other form of tax avoidance except the particular form proscribed by section 191(1)(c)(i) should be permitted to succeed. In the opinion of the Board this argument attributes to Parliament a D benevolent attitude towards tax avoidance by companies which is unlikely and unnecessary.

A likely explanation is that Parliament was indifferent to or unmindful of any overlap between the general provisions of section 99 and the particular provisions of section 191(1)(c)(i) or that, in view of the well known difficulties encountered in the formulation and enforcement of E effective anti-tax avoidance provisions, Parliament thought that an overlap might be useful and could not be harmful. Parliament may have had in mind two different tax avoidance positions. There could be tax avoidance in the introduction into a group of companies of a company which had already made a loss; any tax advantage obtained as a result of that introduction would fall foul of section 99. There could also be tax avoidance in the manipulation of the shareholdings or constitution of F a company in order to obtain temporary compliance with the conditions specified by section 191; that manipulation would fall foul of section 191(1)(c)(i). The possibility that such manipulation might also be frustrated by the operation of section 99 does not lead to the conclusion that Parliament must have intended to permit permanent tax avoidance schemes to exploit section 191. The provisions of section 99 are of G general application and, in the absence of an express direction by Parliament excluding section 191 from the ambit of section 99, their Lordships consider that section must be applied in the present circumstances.

This conclusion is supported by the legislative history of sections 99 and 191. The Land and Income Tax Act 1954 included, by way of a general anti-tax avoidance measure, a provision in these terms:

H "108. Agreements purporting to alter incidence of taxation to be void—Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void in so far as, directly or indirectly, it has or

purports to have the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax."

Section 141 of the Act of 1954 provided for group losses to be transferred between companies within the group. Between 1954 and 1969, section 141 did not refer to tax avoidance and therefore section 141 must have been subject to the anti-tax avoidance effect of section 108. The provisions of section 108 were, however, subjected to some judicial criticism. In the words of Richardson J. in the present case "the old section 108 was found to be both unreasonably restrictive and too broad in its application." Section 141 of the Act of 1954 dealing with group relief was amended in 1969 by section 19 of the Land and Income Tax Amendment Act (No. 2) 1969 which introduced a special anti-tax avoidance provision in terms identical to the terms of section 191(1)(c)(i) of the Act of 1976. If Parliament had intended in 1969 to alter the law by exempting section 141 of the Act of 1954 from the provisions of section 108 and to allow for the first time permanent as opposed to temporary tax avoidance schemes formulated by groups of companies exploiting section 141, then Parliament would have made this clear and would not have relied on an implication from an amendment to section 141 which was designed to frustrate a special tax avoidance device. The 1969 amendment to section 141 is consistent with an intention on the part of Parliament to supplement and reinforce section 108 which in some respects had proved and was later to prove ineffective. The 1969 amendment to section 141 is not consistent with an intention on the part of Parliament to repeal section 108 in its application to section 141. Section 108 was amended and replaced by a more extensive general anti-tax avoidance measure in 1974. The amendment and replacement of section 108 in 1974 could not impliedly exempt section 141 from its ambit. The Act of 1976 was a consolidating measure. Section 99 of the Act of 1976 reproduced the 1954 general anti-tax avoidance provisions of section 108 as amended in 1974. Section 191 of the Act of 1976 reproduced the group profit provisions of section 141 as amended in 1969. There was at no time any pressing need to prevent an overlap of general and specific anti-tax avoidance measures. It was better to be safe than sorry. An overlap between section 99 and section 191 cannot be unfair to the tax avoider but a construction of section 191 which silently repeals section 99 would be unfair to the general body of taxpayers. Their Lordships agree with the observations of Woodhouse P. in the present case:

> "It would be quite extraordinary . . . for the draftsman to carefully prevent a tax advantage because the shareholding was 'of a temporary nature' and yet consciously decide that Parliament would wish to give its blessing (and then only by implication) to a manufactured and barely tangible association of the kind under review."

For their third argument and in support of their second argument, the taxpayer advanced the threat that if their chosen method of tax avoidance is not rendered effective by the courts, any commercial

transaction or family arrangement will be fraught with uncertain, capricious or harsh fiscal consequences and will be vulnerable to action by the commissioner under section 99. It was suggested before the Board that a seven-year covenant or a settlement of capital might be void against the commissioner under section 99 as an arrangement entered into for two or more purposes or effects one of which would be tax avoidance, namely, a reduction in the tax payable by the covenantor or the settlor. Indeed the Solicitor-General on behalf of the commissioner seemed inclined to agree. In the judgments in the courts of New Zealand there are references to other disturbing suggestions, for example that the purchase of life insurance in order to qualify for tax exemption would incur the wrath of the commissioner under section 99. Barker J. speculated that

> "a company carrying on business to obtain export incentives could find its business threatened by the use of section 99 by the commissioner."

The frequent argument by the tax avoider that he seeks to protect the interests of a taxpayer who does not indulge in tax avoidance requires serious but sceptical consideration. There are, however, discernible distinctions between a transaction which is a sham, a transaction which effects the evasion of tax, a transaction which mitigates tax and a transaction which avoids tax.

In the present case Barker J. pointed out that the transaction was not a sham. It was not so constructed as to create a false impression in the eyes of the tax authority. The appearance created by the documentation was precisely the reality. In other words, the taxpayer purchased the shares of Perth; the taxpayer did not pretend to purchase the shares of Perth. The question is whether that purchase was also an arrangement under section 99.

Tax evasion also can be dismissed. Evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead to a re-assessment. Fraudulent evasion may lead to a criminal prosecution as well as re-assessment. In the present case the taxpayer fulfilled its duty to inform the commissioner of all the relevant facts.

The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft quoted words of Lord Tomlin in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1, 19, "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be." In that case, however, the distinction between tax mitigation and tax avoidance was neither considered nor applied.

Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an "arrangement" but from the reduction of income which he accepts or the expenditure which he incurs.

Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.

When a taxpayer makes a settlement, he deprives himself of the capital which is a source of income and thereby reduces his income. If the settlement is irrevocable and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the reduction of income.

Where a taxpayer pays a premium on a qualifying insurance policy, he incurs expenditure. The tax statute entitles the taxpayer to reduction of tax liability. The tax advantage results from the expenditure on the premium.

A taxpayer may incur expense on export business or incur capital or other expenditure which by statute entitles the taxpayer to a reduction of his tax liability. The tax advantages result from the expenditure for which Parliament grants specific tax relief.

When a member of a specified group of companies sustains a loss, section 191 allows the loss to reduce the assessable income of other members of the group. The tax advantage results from the loss sustained by one member of the group and suffered by the whole group.

Section 99 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

Section 99 does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.

In the present case the taxpayer subsidiaries seek to reduce their assessable income by a loss of $5.8 million which was sustained by Perth and suffered by Merbank and was not sustained by the taxpayer subsidiaries or suffered by the taxpayer. It is true that the taxpayer expended $10,000 in purchasing the shares in Perth but this purchase price is not deductible against the taxpayer's assessable income. Apart from the risk of losing $10,000, the Challenge group never risked anything, never lost anything and never spent anything but now claim to deduct a loss of $5.8 million. The taxpayer has practised tax avoidance to which section 99 applies. The taxpayer has not practised tax mitigation because the Challenge group never suffered the loss of $5.8 million which would entitle them to a reduction in their tax liability of $2.85 million. The tax advantage stems from the arrangement with Merbank and not from any loss sustained by the taxpayer or the Challenge group.

it was argued that if this appeal by the commissioner succeeds, a purchase of shares in a company which becomes part of a specified group will always be void under section 99. But a purchase of shares

A will only be void in so far as it leads to tax avoidance and not tax mitigation.

In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss or expenditure which other taxpayers suffer and which Parliament intended B to be suffered by any taxpayer qualifying for a reduction in his liability to tax.

In *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1 the Duke avoided tax by reducing his assessable income without reducing his income by the method of substituting an annuity for a wage payable to his gardener. So long as the gardener continued to work, C the Duke gained a tax advantage over other taxpayers who paid wages to their working gardeners.

In *Black Nominees Ltd. v. Nicol* (1975) 50 T.C. 229 an actress sought to avoid income tax by reducing her assessable income without reducing her income. She converted her earnings into instalments of capital by a number of transactions each designed to take advantage of some specific exemption or relief provision of the taxing statute. She D attempted to obtain a tax advantage over other actresses and other taxpayers who paid tax on their earnings.

In *Chinn v. Hochstrasser* [1981] A.C. 533 the trustees and beneficiaries under a settlement attemped to avoid capital gains tax payable on the distribution of trust property. By a number of transactions each designed to take advantage of some specific exemption E or relief provision of the taxing statute, the beneficiary entitled to trust shares was converted into a purchaser of the shares without involving him in the expenditure of a purchase price. The beneficiary attempted to obtain a tax advantage over other beneficiaries who paid capital gains tax when they became entitled to trust property.

In *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1979] 1 W.L.R. 974 the taxpayer attempted to avoid capital gains tax by F making a deductible loss matched by a non-chargeable gain and setting off the loss against a pre-existing chargeable gain. In reality the taxpayer did not make any loss. The taxpayer attempted to obtain a tax advantage over other taxpayers who paid capital gains tax on chargeable gains.

In *Inland Revenue Commissioners v. Burmah Oil Co.* (1981) 54 G T.C. 200 the House of Lords refused to accept that the taxpayer "had achieved the magic result of creating a tax loss that was not a real loss;" *per* Lord Fraser of Tullybelton, at p. 221. Lord Scarman said, at p. 222, that in considering any tax avoidance scheme "it is now crucial . . . to take the analysis far enough to determine whether a profit, gain or loss is really to be found."

Most tax avoidance involves a pretence: see the analysis in *W. T.* H *Ramsay Ltd. v. Inland Revenue Commissioners* [1979] 1 W.L.R. 974, 979. In the present case the taxpayer and its taxpayer subsidiaries pretend that they suffered a loss when in truth the loss was sustained by Perth and suffered by Merbank. In New Zealand section 99 would

apply to all the cited English cases of income tax avoidance. Section 99 also applies where, as in this case, the taxpayer alleges that he has achieved the magic result of creating a tax loss by purchasing the tax loss of another taxpayer. In order to escape section 99 a transferable loss must be sustained by a member of a group which suffers the loss.

In the present case the facts are starkly simple. Perth appears to have had no assets and no debts. The only purpose of the agreement dated 28 February 1978 was tax avoidance. If Perth had assets, no doubt the purchase price paid by the taxpayer would have been higher than the $10,000 minimum payable pursuant to the agreement. In that event the agreement would have had two purposes, the disposition of the assets and tax avoidance. Section 99 would have required the commissioner to eliminate the tax advantage claimed. If Perth had debts, the tax avoidance arrangement would have been difficult if not impossible without the agreement of the creditors. But section 99 would still require the elimination of the tax advantage. Whatever the circumstances or complications, if a taxpayer asserts a reduction in assessable income, or if a taxpayer seeks tax relief without suffering the expenditure which qualifies for such relief, then tax avoidance is involved and the commissioner is entitled and bound by section 99 to adjust the assessable income of the taxpayer so as to eliminate the tax advantage sought to be obtained.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the assessment made by the commissioner on 12 March 1980 should be restored and that the costs of the commissioner before the New Zealand courts should be paid by the taxpayer. The taxpayer must also pay the commissioner's costs before the Board.

Lord Oliver of Aylmerton delivered the following dissenting judgment. I have the misfortune to take a different view of this appeal from that taken by the Board. I would, for my part, concur with the majority judgment in the Court of Appeal.

I entirely agree that if section 99 stood alone and in isolation from the other provisions of the statute it would be difficult to imagine a clearer case than this of a transaction entered into for the purpose of tax avoidance as defined by the section. I can also appreciate the argument that, whilst sections 188 and 191 provide a statutory code for the regulation of the basis of taxation of a group of companies once established, nevertheless the effectiveness of the anterior stage of establishing the group structure itself may fall to be tested by reference to section 99 alone before one ever comes to the question of how the provisions of sections 188 and 191 are to be operated.

I would find no difficulty whatever in accepting that argument were it not for the provisions of section 191(1)(c)(i). It is at this point, however, that I part company from the Board for I cannot, for my part, construe those provisions as importing a requirement that they are to be regarded, as it were, at a stage later than that at which the provisions of section 99 fall to be considered. Both sections are part of the same consolidating statute and it is, as it seems to me, inevitable that they have to be considered together with a view to testing their impact upon one another. So viewed I find myself oppressed by the difficulty of giving

A any sensible meaning to or operation for the provisions of sections 188 and 191 if section 99 properly falls to be construed as widely as the commissioner urges and as, I confess, its literal terms suggest. For sections 188 and 191 are, in terms, concerned with conferring—and deliberately conferring—upon corporate taxpayers an option to regulate their affairs in a way which will reduce the liability of a group and of individual companies within the group to income tax. That is, by definition, "tax avoidance" and I find myself quite unable to understand how a decision of a board of directors, for instance, to make a subvention payment under section 191(7) or to elect to give notice under section 191(5) can fail to be a "plan" or "understanding" which constitutes an 'arrangement' as defined by section 99(1). If that is right, then the avoidance of the plan or understanding directed by section 99(1) has the instant effect of depriving the relevant provisions of section 191 of any operation at all. To say that, for instance, an election under section 191(5) is valid except where it is made for the purpose of tax avoidance (as defined by section 99) is to emasculate section 191(5), for there can be no other purpose in the election thus contemplated than tax avoidance. And yet the two provisions, appearing as they do in the same consolidating statute, were clearly intended to stand together. For my part, I am driven to the same conclusion as that reached by the majority of the Court of Appeal, namely that the only possible reconciliation of sections 99 and 191 is to treat the latter as providing the code for group taxation and one which contains its own exhaustive anti-avoidance provisions, so that section 99 falls to be read as subject to a limitation that it does not avoid a transaction authorised in terms by section 191.

I am fortified in the conclusion at which I have arrived by two considerations. In the first place, even the commissioner concedes that section 99, albeit expressed in the widest possible terms, has to be read subject to some limitation as regards transactions permitted or authorised by other legislative provisions if it is not to produce results that are absurd. Secondly, it seems to me that a consideration of the history of the legislation, far from supporting the contrary conclusion, demonstrates a legislative intention that the limits of permissible tax rearrangement in the case of corporate groups were to be found in the provisions of what is now section 191 and in those provisions alone.

As regards the former of these considerations, the example given in the course of argument was that of the simple gift of income to, for instance, a grandchild of the donor or to a charity by way of deed of covenant. The Board's attention was not specifically drawn to any provisions of the New Zealand legislation equivalent to those of the United Kingdom Income Tax Acts but the example will serve for present purposes. The commissioner concedes that section 99 does not strike down such an arrangement, even though it undoubtedly has as one of its purposes the alteration of the incidence of tax and the reduction of the total tax payable and so would, prima facie, constitute "tax avoidance." The reason why this is so was said to be that the primary purpose of the arrangement was simply the gift of income and

the reduction of the donor's income as a result of the gift, the reduction of tax payable merely being "an incidental purpose or effect." A

With respect to those who take the contrary view, I find this too facile an argument. No doubt the donor's purpose is to make a gift to the donee and thus to that extent to reduce his own income, but there are ways of producing that result which would have no effect upon the tax position of either the donor or the donee and which would not have the effect of reducing in any way the total amount of tax payable. The B purpose and, generally, the sole purpose of effecting the transaction by deed of covenant is to bring into being a contractual obligation which will enable the donor to treat the income given as excluded from his income, which will cause the income given to be treated as that of the donee, and which, in case of a charity, will enable the donee to recover from the revenue the tax which the donor is obliged to deduct C and pay to the revenue. Those consequences are not in any sense 'incidental' to the making of the gift. They are the be-all and end-all of making the gift by that particular form of transaction. The consequences of making gifts of income in this way are statutory consequences provided for, and deliberately provided for, in the legislation and to treat them as avoided by the ex facie unlimited terms in which section 99 is expressed would result in the absurdity that a statutory code D provided by the legislature expressly for the purpose of relieving the donated income of tax would be effectively deprived of any sensible sphere of operation.

Now if it be right that section 99 has, in some circumstances at least, to be read as subject to the implied limitation that its operation is subject to other provisions of the Act authorising transactions of a E particular type and prescribing the tax consequences of such transactions, is section 191 such a provision? For my part, the history of the anti-avoidance legislation impels me to the conclusion that it is. The original statutory anti-avoidance provision was contained in section 108 of the Land and Income Tax Act 1954 which, subject to a formal amendment in 1968, remained in force until 1974. Its terms have already been recited in the judgment of the Board. It was against that background F that, in substitution for the existing provisions as regards groups of companies contained in section 141 of the Act of 1954, section 27 of the Land and Income Tax Amendment Act (No. 2) 1968 introduced a new section 141 containing provisions enabling, in certain specified circumstances, losses of a company forming part of a group of companies at a particular time to be set off against the assessable G income of other companies in the same group. That section (by sub-section (8)) also authorised the making of subvention payments and directed the tax consequences of such payments. Quite clearly the making of such payments would have, and was intended to have, the effect of altering the incidence of income tax. Nevertheless section 108 could not sensibly be construed as avoiding the very payments which the legislature had expressly authorised to be made. H

The new section 141 was amended in the following year by section 19 of the Land and Income Tax Amendment Act (No. 2) 1969. In particular there was a significant amendment of the provisions of section

141(3) which had previously provided that, in determining whether a person held the requisite proportion of paid-up capital, shares allotted or title to profits to enable the company concerned to be treated as part of the group for the purposes of the section, the commissioners should be entitled to ignore shares bearing only a fixed rate of dividend. Section 19 of the Act of 1969 substituted for the existing subsection (3)(c) of section 141 the following new paragraph:

> "(c) The proportion of the paid-up capital, and of the nominal value of the allotted shares, and of the voting power, and of the title to profits held by any person in any company at the end of any income year shall be determined by the commissioner; and (i) In determining those proportions, the commissioner shall disregard any alteration in those proportions which, in his opinion, is of a temporary nature and has or purports to have the purpose or effect of in any way—(A) Altering the incidence of income tax; or (B) Relieving the company or any other company from its liability to pay income tax,—by in either case excluding that company or any other company from, or including that company or any other company in, any group of companies in relation to that income year."

What is particularly significant about this amendment is that it adopts, in connection with the alteration which the commissioner is to disregard, the ipsissima verba of section 108 (subject only to necessary amendments having regard to the subject matter). For my part, I am unable to see how an alteration of the proportion in which shares are held, voting power is exercisable or profits are distributed can fail to be an "arrangement . . . entered into" and it follows either that the legislature, in providing for the disregarding of "temporary" arrangements, was providing for the avoidance of an arrangement (whether temporary or permanent) already avoided by section 108 or it was deliberately restricting the effect of the anti-avoidance provision to arrangements of a temporary nature. I am not, for my part, persuaded that there can legitimately be attributed to the legislature the eccentric intention of deliberately enacting an amendment which, on the footing that section 141 had to be read subject to section 108, was clearly otiose. In providing specifically for the disregarding of alterations which were (a) temporary and (b) carried out for the purpose of tax avoidance, the legislature must, as it seems to me, have been limiting the extent to which alterations made for the purpose of tax avoidance were to be disregarded in connection with group taxation. Thus one starts with the position that, immediately prior to the enactment of section 99 of the Income Tax Act 1976 and the re-enactment of section 141 as section 191 of that Act, the anti-avoidance provisions of section 108 could not sensibly be applied to corporate structural arrangements made to comply with the provisions of section 141 and that that section contained its own anti-avoidance provisions, restricted to temporary alterations.

Before considering the effect of the introduction into this legislative picture of section 99 in the form in which it stood at the time material to

this appeal—it has subsquently been amended—I must briefly consider an incidental argument that was raised by the commissioner before the Board but which does not appear to have been relied on below and does not appear in the commissioner's case. The argument was this, that whatever may be the effect of section 191(1)(c)(i) in a case where there was in the year in question an existing shareholding, it cannot apply to the original acquisition of 100 per cent. of the shares of the company, for that is not an alteration in the *proportion* of the paid-up capital held. I have found myself incapable of accepting this argument. Strictly, I suppose, neither nil nor the whole is a "proportion," but the section is clearly directed as much to the case where a shareholder holds all the issued shares as to one where he holds only a lesser amount and I cannot for my part suppose that, in referring to alterations in proportion, the legislature was contemplating an increase from, say 1 per cent. to 99 per cent. but not an acquisition of the whole share capital, or the attachment of additional voting rights, where some already existed, and not the attachment of voting rights to shares which were previously non-voting shares.

Turning then to the effect of the introduction, in a consolidating statute, of the new section 99, is it reasonable to suppose a legislative intention to subject to the general anti-avoidance provision the group taxation scheme established by previous legislation, containing its own limited anti-avoidance provision and re-enacted in the same terms as before? In answering this question one has, it seems to me, to analyse exactly what section 99 was intended to achieve which was not already achieved by the previous section 108. First it gave a new definition of "arrangement" in more specific terms. Secondly, it made it clear, if that were needed, that it applied as much to avoidance of prospective as of accrued liabilities. Thirdly, it added to tax avoidance as previously defined the purpose of directly or indirectly avoiding, reducing or postponing any liability to income tax. Fourthly, it made it clear that the provisions were to apply even if tax avoidance was merely one, and possibly a subsidiary, purpose or effect of the arrangement. The only escape was where tax avoidance was "merely incidental." Finally, it conferred some new and extensive powers on the commissioner for counteracting the tax advantage sought to be obtained.

I do not for my part find in any of these extensions anything which impels me to the conclusion that the new section was intended to cover transactions which were authorised by other provisions of the Act, and which, as a matter of necessary construction of the preceding legislation, had previously been excluded from the operation of section 108 although literally falling within its terms. If, as I am persuaded was the case, the former section 108 did not bite upon an arrangement made in order to comply with the provisions of section 191, then I cannot for my part find anything in the terms of the new section 99 which would lead to the conclusion that that section was to override the prior construction of section 191 as a self-contained code standing apart from the existing section 108. Such an intention cannot, as I see it, stem from the expanded definition of "arrangement." What was done here was already an "arrangement" within section 108. It is not to be found in the

extension, if it was one, of the effectiveness of the section to prospective liability. And it is not to be found in the expanded definition of tax avoidance or in the application of the section to subsidiary as well as to primary purposes. If then it is to stem from anywhere it is only from the bare fact of the enactment of a new anti-avoidance provision which, so far as it covered new ground, did not do so in any respect relevant to section 191. If the prior section 108 did not strike down the transaction in the instant case—and for the reasons I have endeavoured to express I do not believe that it did—then I can see no ground for holding that the introduction of the new section 99 had that effect.

For my part, therefore, I agree with the majority of the Court of Appeal.

Solicitors: Allen & Overy; Freshfields.

S. S.

[PRIVY COUNCIL]

JOHN DAVID STANNARD AND OTHERS . . . APPELLANTS

AND

LORRAINE MARIE ISSA . . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF JAMAICA]

1986 Nov. 10, 11; Dec. 2

Lord Keith of Kinkel, Lord Mackay of Clashfern, Lord Ackner, Lord Oliver of Aylmerton and Sir Ivor Richardson

Jamaica—Restrictive covenant—Discharge or modification—Lots subject to restriction against sub-division—Application for modification of restrictions opposed—Whether restrictions impeding reasonable user of land—Whether modification injuring persons entitled to benefit of restriction—Restrictive Covenants (Discharge and Modification) Act (No. 2 of 1960), s. 3(1)(b)(d)

A plot of land in Jamaica on the coast was sub-divided into 11 lots. The applicant purchased two lots which together with six others was subject to covenants not to sub-divide the land, not to erect a building other than one which with appropriate

outbuildings would cost not less than £2,000 to erect, and not to carry on trade or business or use the land for any commercial purposes. The restrictions were intended to preserve the privacy of each purchaser's land, and the quality of the sub-division. By 1982 seven of the lots each had a single dwelling house, and the lots constituted a peaceful seaside enclave of a family nature. The applicant wished to redevelop her land by erecting six blocks of three storey buildings, comprising 40 residential apartments, and other amenities including two swimming pools. Accordingly, she applied to a judge in chambers in the Supreme Court of Jamaica in Equity for modification of the covenants pursuant to section 3(1)(*b*) and (*d*) of the Restrictive Covenants (Discharge and Modification) Act.[1] Objections to the application were made by owners of other lots subject to the covenants. The applicant was subsequently granted planning permission for the development. The judge dismissed the application holding that the continued existence of the covenants did not impede the reasonable user of the applicant's land, and that the proposed modifications would adversely affect the practical benefits secured to the objectors by the covenants. The Court of Appeal of Jamaica by a majority reversed that decision and ordered modification of the covenants as proposed by the applicant.

On the objectors' appeal to the Judicial Committee:—

Held, allowing the appeal, that in order to establish that the continued existence of the restrictions without modification would impede the reasonable user of the applicant's land within section 3(1)(*b*) the applicant had to establish that the covenants without modification to a real or sensible extent hindered the reasonable use of that land and not merely that some reasonable use of the land was impeded to a sensible degree; that, since despite the restrictions reasonable use of the land was still possible and it could without difficulty be developed or disposed of for development, the applicant had failed to satisfy the first limb of paragraph (*b*) and, accordingly, the judge had properly dismissed the application (post, pp. 186D, 187C–D, F–G).

In re Ghey and Galton's Application [1957] 2 Q.B. 650, C.A. applied.

Per curiam. For anyone desirous of preserving the peaceful character of a neighbourhood, the ability to restrict the number of dwellings permitted to be built is a clear benefit. It is clear that the judge was correct in finding that the continued existence of the covenants did secure substantial practical benefits to the objectors within the meaning of the second limb of section 3(1)(*b*) and in being unpersuaded that the requirements in paragraph (*d*) that the modification proposed would not injure the objectors had been satisfied (post, p. 188E, F–G).

Decision of the Court of Appeal of Jamaica reversed.

The following cases are referred to in the judgment of their Lordships:

Constant Spring and Norbrook Estate, In re (1960) 3 W.I.R. 270

Ghey and Galton's Application, In re [1957] 2 Q.B. 650; [1957] 3 W.L.R. 562; [1957] 3 All E.R. 164, C.A.

Gilbert v. Spoor [1983] Ch. 27; [1982] 3 W.L.R. 183; [1982] 2 All E.R. 576, C.A.

[1] Restrictive Covenants (Discharge and Modification) Act, s. 3(1): see post, p. 183D–H.

Howard (M.) (Mitcham) Ltd.'s Application, In re (1956) 7 P. & C.R. 219
Miscamble's Application, In re [1966] V.R. 596
Ridley v. Taylor [1965] 1 W.L.R. 611; [1965] 2 All E.R. 51, C.A.
Wakefield Corporation's Application, In re (1953) 7 P. & C.R. 90

The following additional cases were cited in argument:

Abbey Homesteads (Developments) Ltd. v. Northamptonshire County Council (1986) 278 E.G. 1249, C.A.
Chapman's Application, In re (1980) 42 P. & C.R. 114
Forgacs' Application, In re (1976) 32 P. & C.R. 464
Henderson's Conveyance, In re [1940] Ch. 835; [1940] 4 All E.R. 1
Lots 12 and 13 Fortlands, In re (1969) 15 W.I.R. 312
Stephenson v. Liverant (1972) 18 W.I.R. 323

APPEAL (No. 3 of 1985) with leave of the Court of Appeal of Jamaica by the appellant objectors, John David Stannard, Cynthia Ann Stannard, Daniel Gloven, Hurlstone St. Clair Whitehorne and Michael E. N. Costa, from the judgment and order of the Court of Appeal of Jamaica (Kerr and Campbell JJ.A., Carey J.A. dissenting) given on 12 April 1984 allowing an appeal by the respondent applicant, Lorraine Marie Issa, from the judgment of Theobalds J. delivered on 22 June 1983 in the Supreme Court of Jamaica in Equity whereby her application for modification of certain restrictive covenants was dismissed. The Court of Appeal granted the modifications sought in her originating summons.

The facts are stated in the judgment of their Lordships.

Gavin Lightman Q.C., B. St. Michael Hylton (of the Jamaican Bar) and *Elizabeth Jones* for the objectors. Eight of the 11 lots form an enclave, which has a high class residential character affording an environment of peacefulness, quiet and single family dwellings. The proposed modifications would change the character of the enclave and prejudice the amenities especially that of privacy. The relevant statutory provisions are section 3(1) (*b*) and (*d*) of the Restrictive Covenants (Discharge and Modification) Act.

The effect of the covenant against sub-division is to prevent fragmentation and multiplicity of ownership, and so it is conducive to exclusivity, a low rate of occupation and privacy. The second covenant restricts construction to one individual building with appropriate outbuildings, and the third covenant precludes a hotel or holiday letting or any business of letting a property. The covenants confer practical benefits on the objectors because they secure to the objectors a quiet, seaside, single family, resort area. They ensure that the character of the enclave with its single family occupancy is retained and there is consequently exclusivity, privacy and the other incidental amenities. The modifications sought involve loss of these benefits. It would be the thin end of the wedge and lead to further erosion of the covenants and the objectors' protection.

Four questions of law arise: (1) is the test under section 3(1)(*b*) whether the optimum user is impeded or whether the covenants impede all reasonable user? (2) in determining whether the continued existence of the restrictions secure practical benefits and whether the proposed

modification will injure the persons entitled to the benefit of the restrictions is the court to focus on the practical effect of the covenants or on their inferred purpose at the date of the covenants? (3) for the purposes of section 3(1)(*b*) and (*d*) are the benefits secured by a covenant to be discounted or ignored because the covenant leaves it open to the covenantor to carry out some other activity which may erode or destroy those benefits, or because third parties are free to carry out activities which may erode or destroy the benefits? (4) is the thin end of the wedge a substantial argument against modification?

With regard to the first question, under section 3(1)(*b*) the applicant has to establish that the covenants prevent all reasonable user of her land, and it is not sufficient to establish that the optimum user is prevented. The applicant's land can perfectly reasonably be used for the erection of a single dwelling. Reliance is placed upon *Preston and Newsom's Restrictive Covenants Affecting Freehold Land,* 7th ed. (1982), p. 242; *In re Ghey and Galton's Application* [1957] 2 Q.B. 650; *In re Miscamble's Application* [1966] V.R. 596; *In re Constant Spring and Norbrook Estate* (1960) 3 W.I.R. 270, *Stephenson v. Liverant* (1972) 18 W.I.R. 323; *In re Wakefield Corporation's Application* (1953) 7 P. & C.R. 90 and *In re M. Howard (Mitcham) Ltd.'s Application* (1956) 7 P. & C. R. 219.

So long as a reasonable user can be carried out the court will not modify a covenant. What is a reasonable user has to be determined in the light of circumstances at the date of the application for modification. It is not sufficient for the applicant to show that there is a reasonable use she wishes to make of the land but that use is impeded by the covenants. If a covenant can no longer fulfil its purpose it is obsolete and then section 3(1)(*a*) applies.

The second question relates to the second part of section 3(1)(*b*) and to paragraph (*d*). The court is concerned with what practical benefits are in fact conferred by the covenants, and if there are any the covenants should not be modified.

The third question concerns the suggestion that the covenants allow a large medical centre to be established on the applicant's land interfering with the objectors' privacy, and that the three other lots in the subdivision which are not subject to the covenants may be developed. However, the fact that the protection afforded by the covenants is incomplete and assailable in some other way than that threatened by the application for modification does not deprive the covenants of the capacity to confer practical benefit. If reliance is placed on the theoretical exposure to such risks, in order to give weight to them the court must consider the certainty that the risks will materialise, the time scale in which that will occur, if ever, and whether if the risks materialise the protection afforded by the covenants will be rendered valueless.

In *Gilbert v. Spoor* [1983] Ch. 27 the Court of Appeal in England gave a wide meaning to the words "practical benefits" in section 84(1) of the Law of Property Act 1925 as amended by section 28 of the Law of Property Act 1969.

In relation to the fourth question, the criteria under section 3 of the Jamaican Act are the consequences on the objectors of the modification

and not merely the proposed user, and therefore the thin end of the wedge is a legitimate and proper consideration in this case. Although modification can only affect the covenants of the person applying to have them modified, if these modifications are allowed there will be no reason why others should not be entitled to the same relief.

Section 3(1)(*d*) only applies where an objection to modification can fairly be regarded as frivolous or vexatious: see *Ridley v. Taylor* [1965] 1 W.L.R. 611 and *Abbey Homesteads (Developments) Ltd. v. Northamptonshire County Council* (1986) 278 E.G. 1249. The objections raised by the objectors are not frivolous or vexatious, and so the applicant cannot rely on section 3(1)(*d*).

The majority in the Court of Appeal of Jamaica erred in law in deciding that the requirements of section 3(1)(*b*) had been satisfied, and the judgments of Theobalds J. and Carey J.A. were correct.

Lloyd Barnett (of the Jamaican Bar) and *Jonathan Brock* for the applicant. There are three questions of law and one of fact, namely: (1) what is the proper interpretation of section 3(1)(*b*)? (2) what is the proper interpretation of section 3(1)(*d*) and is it that injury is suffered unless the objection can be characterised as vexatious or frivolous? (3) what is the proper effect and construction of the restrictive covenants in issue? and (4) do the covenants impede the reasonable user of the land, and are the practical benefits sufficient to justify the continued existence of the covenants without modification?

The first question relates to whether an applicant for modification of a restrictive covenant must establish that the covenant sterilises the land, or in other words that the user permitted by the covenant is no longer possible. In *In re Henderson's Conveyance* [1940] Ch. 835, 845–846, Farwell J. was not laying down a test that the land had to be rendered entirely useless by the covenant before modification could be granted, nor was he suggesting that the covenant could not be removed if someone had the benefit of the restriction. Lord Evershed M.R. in *In re Ghey and Galton's Application* [1957] 2 Q.B. 650, 663, indicated that the factors to be taken into account are far more flexible than is contended on behalf of the objectors. It is a question of fact and degree, but the real test is that there must be a real and sensible hindrance of user not prevention. The reasonableness of the user has to be tested in all the circumstances. The jurisdiction of the court arises in situations falling short of sterilisation, and it is not excluded merely because a possible user still exists. *In re M. Howard (Mitcham) Ltd.'s Application,* 7 P & C. R. 219, was decided before the judgment of the Court of Appeal in *In re Ghey and Galton's Application* [1957] 2 Q.B. 650.

It is not reasonable for the applicant's use of her land to be limited while in close proximity there can be development for commercial purposes. Unreasonableness which results from obsoleteness is no different from unreasonableness in this situation. The covenants were from the outset unreasonable because they imposed restrictions on some people but not on others.

The majority of the Court of Appeal relied upon the fact that more far reaching developments than that desired by the applicant is permissible within the sub-division, for instance a medical centre is

permissible on land subject to the covenants and its use is not limited to a single family dwelling. Regard must be had to the scope of the protection afforded by the covenants, and it is clear that they were designed to ensure a certain quality for the locality.

The Jamaican courts have adopted the test of Lord Evershed M.R. in *In re Ghey and Galton's Application* [1957] 2 Q.B. 650, 663: see *In re Constant Spring and Norbrook Estate,* 3 W.I.R. 270, and *In re Lots 12 and 13 Fortlands* (1969) 15 W.I.R. 312. In *In re Miscamble's Application* [1966] V.R. 596 McInerney A.J. in the Supreme Court of Victoria supported the wider test that the interests of both the applicant for modification and the person entitled to the benefit of the restriction should be considered.

The second limb of section 3(1)(*b*) refers to "securing" practical benefits. The question of degree is expressly introduced into the Jamaican Act.

With regard to the second question injury connotes depriving the covenantee of some actual benefit secured by the restrictions. The question therefore arises whether the objectors are able by virtue of the restrictions to preserve the benefits claimed, namely that the area should be one of single family dwellings with the peace and quiet associated with that type of neighbourhood.

[Reference was made to *Ridley v. Taylor* [1965] 1 W.L.R. 611; *In re Forgacs' Application* (1976) 32 P. & C.R. 464; *In re Chapman's Application* (1980) 42 P. & C. R. 114; *Abbey Homesteads (Developments) Ltd. v. Northamptonshire County Council,* 278 E.G. 1249, and *Stephenson v. Liverant,* 18 W.I.R. 323.]

In relation to injury the court must not refuse an application on the basis of possible future applications, because each application must be decided on its own merits. The thin end of the wedge argument does not apply to the jurisdiction of the court but only to the exercise of the court's discretion. That argument does not apply in the instant case having regard to the extent of the protection in fact afforded by the covenants.

As regards the proper interpretation of section 3(1) the terms of the statute, and in particular the use of such phrases as "other circumstances of the case which the judge may think material" in paragraph (*a*) and "would impede the reasonable user" in paragraph (*b*), indicate that the court has a wide and flexible jurisdiction. The section provides for the grant of compensation by the court to any person suffering loss in consequence of the discharge or modification of a restrictive covenant, and that presupposes that there can be situations in which modification may be granted even though some benefit has been lost. Section 3 sets out four independent grounds for the court's jurisdiction, and if obsolescence or sterilisation is the test under paragraph (*b*) there would be no necessity for inserting that paragraph in addition to paragraph (*a*). Paragraph (*b*) must confer jurisdiction in circumstances different from paragraph (*a*). The Act provides a final protection against unwarranted discharge or modification of restrictive covenants by giving the court a discretion, since even if the court is satisfied that it has jurisdiction it has a discretion whether or not to grant the application.

A In a developing country such as Jamaica a flexible approach is commendable as stated by Kerr J.A. in the Court of Appeal.

The third question concerns the true meaning of these covenants. Modification of the covenant not to sub-divide the land was sought by the applicant so that after the proposed development separate titles could be granted under the Registration (Strata Titles) Act. Although the second covenant limits the structures which may be erected on each B lot to one building and appropriate outbuildings, their size is not limited and the building need not be a dwelling-house. The height of the structures is not restricted nor their distance from the boundary. Without infringing that covenant a person could build a towering mansion with a swimming pool and in close proximity to the adjoining property.

The third covenant prohibits commercial operations but expressly C permits the conduct of the profession of a medical practitioner. It seems that that is not the only exception as the words "for the avoidance of doubt" indicate that other professional activities may also be permissible. There is no restriction on the type of structure which a medical practitioner can have. In Jamaica they do not usually conduct their profession from their homes.

D The trial judge and Carey J.A. failed to give sufficient weight to the importance of the other three lots, which are not subject to the restrictions. The covenants are not capable of ensuring that the neighbourhood remains one of single family residences with the benefits associated with that type of exclusivity.

The fourth question is one of fact. In determining this question it must be taken into account that while the covenants do not secure the E benefits claimed at the same time they hinder the reasonable development of the applicant's land. The majority of the Court of Appeal adopted a flexible interpretation of the statutory provisions, and having taken account of the covenants' limitations and the practical circumstances they considered all the arguments for and against modification before deciding to exercise their discretion by granting the application. Once it F is established that their jurisdiction existed, the majority of the Court of Appeal took into account all the relevant factors and their decision should be upheld.

Lightman Q.C. in reply. *Meagher on Equity-Doctrines and Remedies,* 2nd ed. (1984), para. 4327, pp. 874–875, shows that section 89 of the Conveyancing Act 1919 of New South Wales is equivalent to the United Kingdom's section 84 of the Law of Property Act 1925 in its unamended G form, and that there is comparative legislation in the other States of Australia except South Australia.

Although there may be flexibility in the exercise of discretion the court's jurisdiction must be fixed. Section 3(1)(*a*) may not apply because a restriction is not obsolete, but if the covenant impedes the reasonable user of the land relief is given under paragraph (*b*) and appropriate H compensation can be awarded.

The Jamaican Act was passed in 1960 after the decision of the Court of Appeal in *In re Ghey and Galton's Application* [1957] 2 Q.B. 650, and so it can be inferred that the legislature had that case in mind.

It is clear from the words "for the avoidance of doubt" in the third covenant that a restrictive construction should be given to what is permitted. The court is not concerned with the construction of the covenants but with their practical consequences, and they are the benefits which they achieve for the objectors.

Cur. adv. vult.

2 December. The judgment of their Lordships was delivered by Lord Oliver of Aylmerton.

This is an appeal from an order of the Court of Appeal of Jamaica (Kerr, Carey and Campbell JJ.A.) made on 12 April 1984 allowing the applicant's appeal from an order of Theobalds J. in the Supreme Court of Jamaica dated 22 June 1983 and ordering that certain restrictive covenants affecting the applicant's land at Harmony Hall in the Parish of St. Mary be modified.

The land concerned lies on the coast between Ocho Rios and Tower Isle in Jamaica and forms part of a larger plot which, in 1952, was sub-divided by the then owner into 11 lots. The site forms, broadly, a semi-circle the base of which is constituted by the main road to Tower Isle and the outer perimeter of which is the sea coast which forms the northern boundary of the site. Within the site a smaller semi-circle formed by a service road communicating with the main road at each end comprises lots 10 and 11, both of which had been reserved for commercial development. The outer semi-circle consists of lots 1 to 9 inclusive. Apart from lot 9, which was retained by the original vendor and is not subject to any restrictions, each of these lots was sold subject to common restrictive covenants and it is not in contest that the objectors, who are respectively the owners of lots 4, 5 and 7, are persons entitled to the benefit of the restrictions as estate owners of their respective lots. The applicant is the owner of lots 2 and 3 and is an original covenantor. The restrictions are as follows:

> "1. That the said land shall not be sub-divided.
>
> "2. No building shall be erected on the said land other than a building which with appropriate outbuildings shall cost not less than £2000 to erect.
>
> "3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes provided however that for the avoidance of doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the erection of any usual sign or name plate in connection with the conduct of such profession shall not be deemed to be in breach of this covenant."

There is no specific restriction requiring that buildings on the various lots shall be used only as private dwelling houses, but in fact such development as had taken place on the site up to the end of 1982 was entirely residential, consisting of seven villa-type houses each standing in its own grounds and described by the trial judge as development of a

"peaceful, quiet, seaside, single family nature." The applicant having become desirous of redeveloping the two lots of which she was the owner, obtained in 1983 a planning permission for a scheme of development consisting of the erection of six blocks of three-storey buildings comprising 40 residential apartments together with amenities including two swimming pools. It was proposed that the development would be sub-divided horizontally into strata lots pursuant to the Registration (Strata Titles) Act (No. 42 of 1968). No doubt in anticipation of such permission she applied on 31 December 1982 by originating summons for an order modifying the restrictions pursuant to the provisions of the Restrictive Covenants (Discharge and Modification) Act (No. 2 of 1960). She had already obtained the consent of the owners of lot 1 to the modification which she proposed.

The Restrictive Covenants (Discharge and Modification) Act is modelled upon section 84 of the Law of Property Act 1925 of the United Kingdom (15 & 16 Geo. 5, c. 20) in its original form and it is accepted by both sides that the English authorities governing the construction and operation of that section are equally applicable to the construction and operation of the Act notwithstanding the slight verbal differences. Section 3(1) provides, so far as material:

> "(1) A judge in chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied—(*a*) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the judge may think material, the restriction ought to be deemed obsolete; or (*b*) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or . . . (*d*) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction: Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss."

The modification sought by the applicant consisted of the substitution for the original restrictions of the following:

"1. That the said land shall not be sub-divided save that the erection of apartment buildings under the Registration (Strata Titles) Act or otherwise with appropriate outbuildings shall not be deemed a breach of this covenant.

"2. No building shall be erected on the said land other than buildings which with appropriate outbuildings shall cost not less than £2000 to erect.

"3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes provided however that for the avoidance of doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the erection of any usual sign or name plate in connection with the conduct of such profession and the use of the said land or any buildings thereon for the purposes necessary and incidental to the management and operation of any apartment building shall not be deemed to be in breach of this covenant."

The objectors objected to the modifications proposed on a number of grounds, the principal one of which—and the only one with which, in the event, this appeal is concerned—was that the judge could not, on the evidence, be satisfied that any of the conditions for the making of an order under section 3(1) of the Act existed. It was not contended that the covenants had become obsolete, so that the court had to be satisfied that one or other of the alternative requirements set out in paragraphs (*b*) and (*d*) had been fulfilled. As to (*b*) the submission was that a perfectly reasonable user of the land (that of a single private residence) was permitted by the covenant and that in any event there were various practical benefits enjoyed by the objectors by reason of the covenant which justified the maintenance of the restrictions in their original form. As to (*d*) it was argued that effectively that paragraph applied only where the objections raised were so insubstantial that they could properly be categorised as frivolous. In the Supreme Court, Theobalds J., after visiting the site, determined that the continued existence of the covenants in their present form did not impede the reasonable user of the applicant's land and that in any event the proposed modification would adversely affect the practical benefits secured to the objectors by the continuation of the restrictions. Moreover he expressed himself as unsatisfied that the proposed modification would not injure the objectors. He accordingly refused an order and dismissed the summons with costs.

The applicant appealed to the Court of Appeal which, on 12 April 1984, reversed by a majority the decision of Theobalds J. and ordered that the restrictions be modified as proposed in the originating summons.

Their Lordships have had some difficulty in following the reasoning by which the majority in the Court of Appeal arrived at the conclusion that the requirements of section 3(1)(*b*) and (*d*) were satisfied. It appears to have been this, that the question of whether the reasonable user of the land was impeded by the restrictions was inextricably bound up with the question of whether the court could discern sufficient practical benefit in those entitled to enforce the restrictions to justify

their continuation. They seem to have entertained the opinion that unless they could be satisfied that there was some substantial and precisely ascertainable benefit to be derived from the restrictions by those entitled to enforce them it necessarily followed that the restrictions impeded the reasonable user of the land. Campbell J.A. was indeed prepared to go further and to say that the burden on an applicant relying on section 3(1)(*b*) was merely to show that the user of the neighbouring lands had

> "changed sufficiently in quality . . . such that the existing user of the sub-division lots . . . is no longer consonant with the current view on the optimum user of lands in the neighbourhood."

Kerr J.A. considered that inasmuch as (a) there was no specific requirement that buildings erected on the land should be used as private dwelling houses and no limit on size or architectual design of such buildings (b) it was open to the owners of lots 9, 10 and 11 to develop their lots for commercial purposes (though they had not done so) and (c) it was open to each plot-owner to turn his sub-division into a medical centre without being in breach of covenant (although none had done so) it followed that the covenants secured no practical benefit whatever worth preserving. As to the question whether the covenant impeded the reasonable user of the land, which he described as a correlative consideration with the existence of a practical benefit to those entitled to the benefit of the covenant, he favoured a liberal approach which, in a densely populated island such as Jamaica and with the modern trend in building town houses and condominiums, he described as "reasonable, relevant and commendable." The area was, he observed, a tourist resort area and "the development contemplated is in harmony with the area and with current developments in close proximity to the lots in this sub-division." Much the same approach was adopted by Campbell J.A. He adverted to the possibility, within the framework of the restrictions as they stood, of carrying on activities which would impinge on the privacy of owners of adjoining lots. They thus, in his view, secured no benefits, their real purpose being to preserve the quality of the locality by restricting the density of development. He analysed the issue on the appeal in these terms:

> "Since the restrictive covenants did not secure privacy and the other practical benefits found by the learned trial judge but only the benefit of having the quality of the locality preserved the learned trial judge should have considered the application as one to secure intensification of the user of the lots for residential purpose in a situation where the only issues were whether the modification sought would injure the objectors by causing a diminution in value of their lots or deprive them of the benefit of continuing to reside in a good quality residential area albeit not exclusively residential and whether the user sought would be in conflict with the general character of the neighbourhood."

The test to be applied in applications for modification under section 3(1)(*b*) of the Act is, he observed:

"the reasonableness of the user for which modification of the covenant is sought and in applying this test it is necessary to consider not only the particular lot in question but the neighbourhood in which it is situated as also the purpose which the covenants were devised to achieve and whether the modifications sought would stultify or destroy the aforesaid purpose."

He appears also to have considered that because it was possible to conceive of developments within the framework of the restrictions which might have the effect of defeating the manifest intention of preserving the quality of the locality by restricting the density of occupation it followed that a modification which enabled development to a greater density to take place would not result in any injury to the objectors since the market value of their properties would not, in the light of contemporary views of acceptable housing densities, be depreciated.

Carey J.A. in a powerful dissenting judgment observed:

"An applicant for modification or discharge of a restrictive covenant where his ground is that provided for in section 3(1)(*b*) has a burden imposed on him to show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded. . . . Lord Evershed M.R. in *In re Ghey and Galton's Application* [1957] 2 Q.B. 650, 663 expressed the view that in relation to this ground—'it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants.' Put another way, the restrictions must be shown to have sterilised the reasonable use of the land. Can the present restrictions prevent the land being reasonably used for purposes the covenants are guaranteed to preserve? Accordingly, I would suggest that it would not be adequate to show that the proposed development might enhance the value of the land for that would demonstrate the applicant's proposals are reasonable and the restriction impedes that development."

He concluded:

"I would make one final comment. If the evidence indicates that the purpose of the covenants is still capable of fulfilment, then in my judgment the onus on the applicant would not have been discharged."

After an analysis of the evidence, he agreed with the trial judge that the restrictions had the practical effect of preserving privacy and that they did not impede the reasonable user of the land.

Their Lordships have no hesitation in preferring the dissenting judgment of Carey J.A. Indeed the reasoning of the majority judgments in the Court of Appeal appears to their Lordships not only to be based upon a misconstruction of the plain words of the section but to be contrary to the whole tenor of both the English and West Indian authorities. The corresponding provision of section 84 of the Law of

Property Act 1925 was amended by section 28 of the Law of Property Act 1969 by substituting the word "some" for the word "the" in the expression "impedes the reasonable user" and if that had been done in the Jamaican statute it would, no doubt, be impossible to quarrel with the approach of the majority on any ground save that they had paid too little attention to the actual benefit conferred by the restrictions. But it has not been done and the result at which they arrived can be achieved only by treating the section as if it had been amended and by disregarding the construction universally applied to it in its unamended form. Lord Evershed M.R. in *In re Ghey and Galton's Application* [1957] 2 Q.B. 650, 659–660, pointed out that in order to succeed in an application under section 84(1)(*a*) of the Law of Property Act 1925 an applicant has to go a great deal further than merely to show that, to an impartial planner, his proposal appeared a good and reasonable proposal. He must affirmatively prove that one or other of the grounds of jurisdiction has been established. Lord Evershed M.R., at p. 663, propounded the often quoted test for a successful application under the English equivalent of section 3(1)(*b*) of the Jamaican statute in the terms already referred to in the dissenting judgment of Carey J.A. Curiously enough this was relied upon by Kerr J.A. in his judgment as justifying his approach to the problem. But it is, in their Lordships' judgment, entirely clear that in propounding his test, Lord Evershed M.R. was very far from suggesting, as Kerr J.A. seems to imply, that all that had to be shown was that there was some use of the land which was (a) reasonable and (b) impeded to a sensible degree by the restrictions sought to be modified. That submission, under legislation in all material respects similar to that with which this appeal is concerned, has been decisively rejected—and in their Lordships' view rightly rejected—in a number of decisions of the Lands Tribunal in England: see *In re Wakefield Corporation's Application* (1953) 7 P. & C.R. 90 and *In re M. Howard (Mitcham) Ltd.'s Application* (1956) 7 P. & C.R. 219), by the Supreme Court of Victoria (*In re Miscamble's Application* [1966] V.R. 596) and by the High Court of Jamaica (*In re Constant Spring and Norbrook Estate* (1960) 3 W.I.R. 270). In the instant case there was no evidence whatever of any difficulty in developing the applicant's land or in disposing of it for development within the framework of the existing restrictions and certainly there was no suggestion that they had the effect of sterilising the land. All that was said was that the applicant's proposal was one which made a reasonable user of the land having regard to current pressures of population and current notions of optimum density. In their Lordships' judgment both Theobalds J. and Carey J.A. were right in saying that the applicant failed to surmount the first hurdle placed in her way by section 3(1)(*b*).

That decision renders it strictly unnecessary to consider the further question whether the existence of the restrictions conferred a practical benefit on the objectors sufficient to justify their continuation without modification. However, in their Lordships' judgment, the majority in the Court of Appeal erred also in their approach to this problem. Given any set of restrictions it is not usually difficult to conjure up colourful hypothetical examples of things which could be done within the

framework of the covenants as they stand and which, if done, would substantially impair or defeat the purpose for which the covenants were imposed, but that is not an exercise which the court is enjoined by the section to undertake. What the court exercising this jurisdiction is enjoined to do is to consider and evaluate the *practical* benefits served by the restrictions. The purpose of these restrictions is obvious on their face. It was to preserve the privacy of each purchaser's plot and the quality of the totality of the sub-divisions by restricting housing density, by regulating commercial activity and by providing a lower cost limit intended to ensure good quality development. Whether or not the covenants as drawn are sufficiently specific to achieve all these purposes in the face of a really determined attack by somebody intent on disturbing the peace of the neighbourhood is really immaterial. The undisputed evidence was that in fact all those plots which had been built on had in fact been developed by the erection of single storey private dwellings. It was the trial judge's opinion, after a view, that the land formed a peaceful seaside enclave of a family nature. That was the actuality and, with respect to them, the majority of the Court of Appeal, in positing the nightmare of a complex of medical centres or six-storey castles covering the entirety of the sub-divided lots, were ignoring altogether the practical effects of the restrictions and engaging in unnecessary flights of imagination in order to test whether the original intention of the restrictions was capable of achievement in all circumstances. In doing so they were, in their Lordships' judgment, asking themselves the wrong question. The question is not "what was the original intention of the restriction and is it still being achieved?" but "does the restriction achieve some practical benefit and if so is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?"

It hardly needs stating that, for anyone desirous of preserving the peaceful character of a neighbourhood, the ability to restrict the number of dwellings permitted to be built is a clear benefit, just as, for instance, was the ability in *Gilbert v. Spoor* [1983] Ch. 27 to preserve a view by restricting building. It scarcely requires evidence to demonstrate that the privacy and quietude of an enclave of single dwellings in large gardens is going to be adversely affected by the introduction on adjoining lands of no less than 40 additional families. If, therefore, it were necessary to decide the point, it is in their Lordships' view quite clear that the trial judge was correct in finding that the continued existence of the covenants did secure substantial practical benefits to the objectors and in finding himself unpersuaded that the requirement in paragraph (*d*) of section 3(1) that the modifications proposed would not injure the objectors had been satisfied. As regards this latter consideration, it was observed by Russell L.J. in *Ridley v. Taylor* [1965] 1 W.L.R. 611, 622, that the equivalent of this paragraph in section 84(1)(*c*) of the Law of Property Act 1925 appeared to have been "designed to cover the case of the, proprietorially speaking, frivolous objection." Whilst the trial judge found that some of the objections raised on behalf of the objectors were of an insubstantial nature, on no analysis could it be said that the principal objection to a modification which would permit an unrestricted

sub-division of (and thus an unrestricted density on) the subject land was frivolous or vexatious.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed and the order of Theobalds J. in the Supreme Court restored. The applicant must pay the costs of the objectors before the Board and in the Court of Appeal.

Solicitors: Birkbeck Montagu's; Durrant Piesse.

S. S.

[HOUSE OF LORDS]

KETTEMAN AND OTHERS . . . . . RESPONDENTS

AND

HANSEL PROPERTIES LTD. AND OTHERS . . . APPELLANTS

1986 April 8, 9; Nov. 4, 5;
1987 Jan. 22

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman, Lord Griffiths and Lord Goff of Chieveley

Limitation of Action—Negligence—Accrual of cause of action—Defective foundations for houses—Cracks appearing in walls after one year—Property requiring underpinning—Whether houses doomed from start—Whether damage occurring when foundations laid—Time when cause of action accrues—Whether action statute-barred

Practice—Parties—Joinder—Action for negligence against builders—Defective foundations causing cracks in walls of houses—Joinder of local authority and architects as additional defendants more than six years after appearance of cracks—Whether time ceasing to run as from date of writ or date of joinder—Whether action statute-barred

The plaintiffs were the purchasers of five houses built by the first defendants between June 1973 and June 1975. Between 11 August and 9 September 1976 cracks, caused by faulty foundations, were noticed in the walls of the houses. On 27 May 1980 the plaintiffs issued a writ against the builders alleging breach of contract and negligence. The builders issued a third party notice against the local authority alleging failure to ensure compliance with the building regulations. The local authority issued a fourth party notice against the architects of the houses alleging breach of duty in the design and siting of the houses. On 25 June 1982 the plaintiffs obtained leave to join the local authority and the architects as defendants. The writ was re-issued on 9 September 1982, and, though it was not served on

them, the local authority and the architects conducted themselves thereafter as though they were the second and third defendants. During the closing speeches of the trial of the action, counsel became aware of the publication of authority to the effect that, should a house be so negligently constructed as to be "doomed from the start," time for the purpose of limitation of action might run from the date of construction. The judge allowed an amended defence to that effect and, though it alternatively pleaded a defence of limitation as from the date of occurrence of the defects, he ruled that the joinder of the local authority and architects as defendants took effect from 30 July 1982, less than six years after the damage occurred. The judge gave judgment for all the plaintiffs against the builders and for the first, second and fifth plaintiffs against the architects but he dismissed the claims against the local authority and held that the claims of the third and fourth plaintiffs against the architects was statute-barred.

On appeal by the architects, the Court of Appeal dismissed their appeal and allowed the cross-appeals of the third and fourth plaintiffs against the architects and by all the plaintiffs against the local authority, holding, inter alia, that the action against the local authority and architects had to be taken to have commenced on 27 May 1980, the date of issue of the original writ, so that none of the plaintiffs' claims was statute-barred.

On appeal by the architects:—

Held, (1) that a person added as a defendant did not become a party until the writ had been served on him and that the architects, although never served with an amended writ, had by serving a defence on 6 October 1982 waived the necessity of service and were accordingly joined as defendants from that date; that, further, in computing the period of limitation the date of joinder was not to be related back to the date when the original writ was issued and accordingly time only ceased to run from the deemed date of joinder (post, pp. 198C–D, 199F–G, 200F–G, 209B–G, 210E–H, 217C–D, 218F–G, 223B–E).

Seabridge v. H. Cox & Sons (Plant Hire) Ltd. [1968] 2 Q.B. 46, C.A. overruled.

Byron v. Cooper (1844) 11 Cl. & Fin. 556, H.L.(E.) applied.

Dictum of Brandon L.J. in *Liff v. Peasley* [1980] 1 W.L.R. 781, 803–804, C.A. approved.

(2) That the mere fact of the houses having been constructed in such a way that damage was bound to occur eventually was not sufficient to render the houses "doomed from the start" with time therefore running from the date of construction of the houses; and that, accordingly, time ran from the date of the damage occurring (post, pp. 205D—206A, 208D–G, 217C–D, 223B–E).

Pirelli General Cable Works Ltd. v. Oscar Faber & Partners [1983] 2 A.C. 1, H.L.(E.) applied.

(3) Dismissing the appeal (Lord Keith of Kinkel and Lord Brandon of Oakbrook dissenting), that a plea of limitation was a procedural defence that had to be pleaded and, in considering whether the architects should have leave to amend their defence to plead that the action was statute-barred, it was relevant that, although they had been parties to the action since 1982, they had not sought the leave of the court to amend until the closing stages of the trial when the court had investigated the merits of

the plaintiffs' claims and the plaintiffs had individually undertaken the strain of the litigation in which they had a legitimate expectation that the issues raised in their pleadings would be determined; and that, therefore, the architects should not have been permitted to amend their defence and, in the absence of a plea of limitation, the plaintiffs succeeded on the merits (post, pp. 217A–D, 219D–G, 220D–F, 222E—223B, C–E).

Dictum of Brett M.R. in *Clarapede & Co. v. Commercial Union Association* (1883) 32 W.R. 262, 263, C.A. considered.

Decision of the Court of Appeal [1984] 1 W.L.R. 1274; [1985] 1 All E.R. 352 affirmed on different grounds.

The following cases are referred to in their Lordships' opinions:

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.)

Byron v. Cooper (1844) 11 Cl. & Fin. 556, H.L.(E.)

Clarapede & Co. v. Commercial Union Association (1883) 32 W.R. 262, C.A.

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 201, H.L.(Sc.)

Liff v. Peasley [1980] 1 W.L.R. 781; [1980] 1 All E.R. 623, C.A.

Pirelli General Cable Works Ltd. v. Oscar Faber & Partners [1983] 2 A.C. 1; [1983] 2 W.L.R. 6; [1983] 1 All E.R. 65, H.L.(E.)

Seabridge v. H. Cox & Sons (Plant Hire) Ltd. [1968] 2 Q.B. 46; [1968] 2 W.L.R. 629; [1968] 1 All E.R. 570, C.A.

Sparham-Souter v. Town and Country Developments (Essex) Ltd. [1976] Q.B. 858; [1976] 2 W.L.R. 493; [1976] 2 All E.R. 65, C.A.

The following additional cases were cited in argument:

Bagot v. Stevens Scanlan & Co. Ltd. [1966] 1 Q.B. 197; [1964] 3 W.L.R. 1162; [1964] 3 All E.R. 577

Batty v. Metropolitan Property Realisations Ltd. [1978] Q.B. 554; [1978] 2 W.L.R. 500; [1978] 2 All E.R. 445, C.A.

Cartledge v. E. Jopling & Sons Ltd. [1963] A.C. 758; [1963] 2 W.L.R. 210; [1963] 1 All E.R. 341, H.L.(E.)

Forster v. Outred & Co. [1982] 1 W.L.R. 86; [1982] 2 All E.R. 753, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the appellants, Jamieson Greene Associates, from the judgment of the Court of Appeal (Lawton, Stephen Brown and Parker L.JJ.) [1984] 1 W.L.R. 1274 dismissing their appeal from the judgment of Judge Hayman, sitting as a deputy official referee, given on 18 January 1983 and 14 February 1983 whereby he adjudged, inter alia, that the respondent plaintiffs, Mr. and Mrs. David Michael Ketteman, Mr. and Mrs. Clifford Christopher James Hollebon, Mr. and Mrs. Brian Henry Griffin, Mr. and Mrs. John Shepherd and Mr. and Mrs. Ronald Victor Grover, should have judgment against the first defendants, Hansel Properties Ltd., for breach of contract and/or negligence in the construction of five houses in Marle Avenue, Burgess Hill, West Sussex, which they had sold to the plaintiffs and that the first, second and fifth plaintiffs should have judgment against the appellants, the third defendants, the architects of the houses. The Court of Appeal had also allowed cross-appeals by the third and fourth plaintiffs against the

judge's order dismissing their claims against the appellants, and by all the plaintiffs against his dismissal of their claims against the second defendants, the Mid-Sussex District Council, which had approved the foundations of the houses and granted building regulation consents.

The facts are set out in their Lordships' opinions.

Michael Ogden Q.C. and *Mark V. Smith* for the appellants. On the question whether for the purposes of the law relating to limitation of actions an action is commenced against a new party to an existing action at the date of his joinder thereto or relates back to the date of the original writ, the Court of Appeal was wrong to hold that the action related back to, or must be deemed to have started, when the original writ was issued. That would be contrary to section 2(1) of the Limitation Act 1939. *Seabridge v. H. Cox & Sons (Plant Hire) Ltd.* [1968] 2 Q.B. 46 is wrongly decided. On the question whether the respective cause of action of the houseowners against the appellants accrued upon the occurrence of physical damage to each of their homes or at some earlier date, the Court of Appeal was wrong to hold that the causes of action accrued when physical damage occurred. In *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 A.C. 1, the House decided that for the purposes of the law of limitation of actions the limitation period began when damage occurs, albeit undiscovered and undiscoverable. The speech of Lord Fraser of Tullybelton indicated that such damage would commonly consist of cracks coming into existence as a result of defective construction or design, but did not exclude the possibility that the limitation period might commence before cracking developed. The start of the limitation period precedes the occurrence of physical damage to property whenever the owner of that property has an accrued cause of action in respect of economic loss suffered as a result of the defective construction or design. This principle would follow from the decision of the House in *Junior Books Ltd v. Veitchi Co. Ltd.* [1983] 1 A.C. 520, which acknowledged the validity of an action for pure economic loss. In so far as that case recognised a broader meaning of damage, the statement of principle about the beginning of limitation periods made by Lord Fraser of Tullybelton in *Pirelli* should also be broader. Accordingly, a limitation period in respect of pure economic damage, albeit undiscovered and undiscoverable, commences when that pure economic damage has occurred. In the present case, on becoming the owners of houses with foundations built too near to adjacent trees, the houseowners had a cause of action for pure economic damage to the extent that their houses were less in value than ones with sound foundations. They were not obliged to wait until the occurrence of cracks before commencing action. In any event, the houses were "doomed from the start" in the sense in which Lord Fraser of Tullybelton used the phrase in his speech in *Pirelli* [1983] 2 A.C. 1, 16. The distinction to be drawn is between buildings in which the defect is such that damage will eventuate and can therefore be said to be doomed from the start and buildings in which the defect may or may not cause damage. The importance of the distinction is that the owner of a building in which there is a defect which has not yet caused damage but will do so would in many cases want to start

A proceedings at once, without waiting for damage to occur, perhaps years later, for fear that, as happened in the present case, the builder might go into liquidation. If such an owner had not got an accrued right of action, he would not be able to sue until damage actually occurred. If one can bring an action for pure economic loss, there is no sound reason why that principle should not extend to include the economic loss due to defects in a house resulting in its being worth less than it otherwise B would be. [Reference was made to *Cartledge v. E. Jopling & Sons Ltd.* [1963] A.C. 758; *Batty v. Metropolitan Property Realisations Ltd.* [1978] Q.B. 554; *Bagot v. Stevens Scanlan & Co. Ltd.* [1966] 1 Q.B. 197 and *Forster v. Outred & Co.* [1982] 1 W.L.R. 86.]

The respondents took no part in the appeal.

Christopher Symons for the plaintiffs on the issue of costs.

C *A. E. M. Cooper* for the district council on the issue of costs.

Their Lordships took time for consideration.

22 January 1987. Lord Keith of Kinkel. My Lords, the proceedings giving rise to this appeal have been characterised by an unusual D number of unfortunate vicissitudes, not the least unsatisfactory of which has been its arrival in this House with the appearance of only one of the two appellants to whom the Court of Appeal granted leave to bring it here and with respondents who had no interest in presenting a contradiction of the appellants' argument, and consequently did not do so.

On 27 May 1980 the respondents ("the houseowners"), commenced E proceedings against Hansel Properties Ltd. ("Hansel"), the builders of five houses in Burgess Hill, West Sussex, which the houseowners had respectively purchased from them in 1975. In the summer of 1976 all five houses began to show signs of structural damage in the form of internal and external cracks. The houseowners claimed damages from Hansel on grounds of breach of contract and in tort. The claim was based on the inadequacy of the foundations of the houses. On 28 April 1981 Hansel F issued a third party notice to Mid-Sussex District Council ("Mid-Sussex"), claiming indemnity or contribution upon allegations of negligence by the latter in approving the plans for the foundations and in inspecting them during the course of construction. Mid-Sussex denied the allegations against them and on 18 August 1981 issued a fourth party notice to Jamieson Greene Associates ("the architects") claiming G indemnity or contribution from them on the ground of negligence in the design of the foundations. The architects lodged a denial. The houseowners at first took no steps to have Mid-Sussex and the architects joined as parties to the action, because their solicitors believed that Hansel were sound financially. Later they began to have doubts about this (which have since proved only too well-founded), and in June 1982 they issued a summons for leave to join Mid-Sussex and the architects as H defendants to the action. The summons was heard by Judge Sir William Stabb Q.C. on 25 June 1982, and on that day, no opposition being offered by counsel for Mid-Sussex and the architects, he made an order in these terms:

"It is ordered that : (1) The first third party and the fourth party be joined as defendants to the action. (2) A statement of claim to be served on the first third party and the fourth party within 21 days. (3) Defences to be served 14 days thereafter . . . (7) The trial date for 12 July to be vacated and that the date for trial to be fixed for 22 November 1982 with an estimated length of ten days."

What happened next was thus described by Lawton L.J. in the course of his judgment in the Court of Appeal [1984] 1 W.L.R. 1274, 1282:

"This order did not state explicitly that the specially endorsed writ should be amended. Counsel for the plaintiffs was instructed to settle an amended statement of claim. This he did. On or about 26 July 1982 a court clerk employed by the plaintiffs' solicitors went to the central office to get the amended specially endorsed writ stamped. A clerk there refused to apply the stamp on the ground that the order of 25 June 1982 did not provide for the writ endorsed with the statement of claim to be amended. It did so by implication because it provided that the third and fourth parties should be joined as defendants to the action. It is to be regretted that the clerk decided as he did. By letters dated 30 July 1982 the plaintiffs' solicitors sent the third and fourth parties an amended specially endorsed writ together with a draft consent order to put right that which the clerk in the central office had said was wrong. The fourth parties' solicitors returned the draft consent order duly endorsed on 4 August 1982. The third parties did the same on 9 August. The plaintiffs' solicitors returned to court on 8 September 1982. Judge Newey Q.C. then made an order in these terms: 'Upon reading the parties' agreed terms it is ordered that: The plaintiffs have leave to amend the statement of claim in the form annexed hereto.'

"On 9 September 1982 the writ was re-issued. On 17 September 1982 the plaintiffs' solicitors sent the third and fourth parties a copy of the order dated 8 September, but they did not serve them with a copy of the re-issued amended writ, as they should have done. Thereafter, the third and fourth parties behaved as if they were the second and third defendants."

It is to be added that copies of an amended statement of claim were also sent to the solicitors for Mid-Sussex and for the architects.

The result is that technically Mid-Sussex and the architects have never been properly joined as defendants. But having entered defences and since participated in the proceedings as defendants they could not now be heard to take that point.

The trial of the action began before Judge Hayman, sitting as a deputy official referee, on 23 November 1982 and continued for some time. On 10 December 1982, after counsel for the architects had concluded his submissions on the evidence and counsel for the plaintiffs was in the course of making his, counsel became aware of the decision of this House in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 A.C. 1, judgment in which had been delivered on the previous day. In that case the House, disapproving of certain dicta in

A the Court of Appeal in *Sparham-Souter v. Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858, held that the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or could with reasonable diligence have been discovered. The leading speech, concurred in by the others of their Lordships who heard the B appeal, was that of Lord Fraser of Tullybelton, who said, at p. 16:

> "The plaintiff's cause of action will not accrue until *damage* occurs, which will commonly consist of cracks coming into existence as a result of the defect even though the cracks or the defect may be undiscovered and undiscoverable. There may perhaps be cases where the defect is so gross that the building is doomed from the C start, and where the owner's cause of action will accrue as soon as it is built, but it seems unlikely that such a defect would not be discovered within the limitation period. Such cases, if they exist, would be exceptional."

Counsel for Mid-Sussex and for the architects, reading the report of the decision in "The Times" newspaper, perceived that they might have D available to them a defence of limitation, as the decision indicated that in a case of this kind the limitation period began to run from an earlier date than had previously been thought to apply. They accordingly applied for leave to amend their defences, the proposed plea in the case of the architects being in these terms:

> "If (which is denied) the third defendants were guilty of negligence E or breach of statutory or other duty whether as alleged or at all, time for the purposes of the Limitation Acts began to run on the occurrence of one of the following events: (a) the submission to and/or approval by the local authority for building regulations purposes of the plans drawn by the third defendant and/or the approval by such authority of the excavations and/or foundations at F the plaintiffs' premises allegedly constructed in reliance upon the said plans, whereby the homes or back of them were defectively designed and/or built as alleged by the plaintiffs; (b) the defective construction and/or completion of the houses and/or of their foundations, as alleged by the plaintiffs; (c) the purchase by the plaintiffs and each of them of their respective houses, designed and/or constructed defectively as alleged by the plaintiffs; (d) the G settlement of the foundations wholly or in part or other movement or damage at the said houses caused or contributed to by the defective design and/or construction as alleged by the plaintiffs.
>
> "The third defendants will contend that each of the events above mentioned occurred more than six years prior to the joinder of the third defendants."

H At this stage neither counsel appear to have appreciated that, due to the events described earlier, their clients had not been joined as defendants until at the earliest 9 September 1982. It seems to have been taken for granted that they had been joined very soon after Judge Sir

William Stabb's order of 25 June 1982. The evidence led in the action had been to the effect that cracks in the five houses had been discovered in the course of August and early September 1976. So counsel had in mind to argue primarily that the houses were "doomed from the start" within the meaning of Lord Fraser of Tullybelton's dictum, and paragraphs (a), (b) and (c) of the proposed amendments were directed to this aspect. Paragraph (d) was directed to a date such as was actually decided in the *Pirelli* case [1983] 2 A.C. 1 to have been that upon which the limitation period had started to run. They did not believe that they might have had a limitation defence under the law as it was understood to have been before the *Pirelli* decision, and it seems that they so informed Judge Hayman when moving the proposed amendments. Judge Hayman allowed the amendments upon terms as to costs, and offered all parties an opportunity of leading further evidence if so advised, an opportunity of which none of them took advantage. 10 December was a Friday, and it seems that in the course of the ensuing weekend counsel discovered the true state of affairs regarding the joinder as defendants of Mid-Sussex and the architects, and the judge was told about it on the following Monday, 13 December. The case was adjourned until 18 January 1983, when Judge Hayman, on the plaintiffs' application, made an order amending that of Judge Sir William Stabb Q.C. dated 25 June 1982 to the effect that time for joinder of Mid-Sussex and the architects was extended to 9 September 1982 and that the joinder was to be effective as from 30 July 1982.

On 14 February 1983 Judge Hayman delivered a judgment in favour of three of the plaintiff houseowners against Hansel and the architects and in favour of two of them against Hansel only. Judgment was entered for Mid-Sussex against all the plaintiffs. He found negligence to have been proved against Hansel, Mid-Sussex and the architects, but that Mid-Sussex was not liable because it had not been established that the condition of the houses presented any present or imminent danger to the health or safety of the occupants—which in the light of *Anns v. Merton London Borough Council* [1978] A.C. 728 he held to be a necessary condition of liability. In the case of the two plaintiffs who failed against the architects he held that the latter succeeded in their limitation defence in respect that it had not been established on the evidence that physical damage to the two houses concerned had first occurred on or after 30 July 1976, viz. less than six years before the date of joinder of the architects, which he took as being 30 July 1982.

The houseowners and the architects appealed to the Court of Appeal. All the houseowners appealed against that part of the judgment which dismissed their claims against Mid-Sussex. The two whose claims against the architects had been dismissed appealed against that part of the judgment. The architects appealed against the part of the judgment which decided against them in favour of the other three houseowners. All the houseowners also appealed out of time, with leave, against the order of Judge Hayman, on 10 December 1982, allowing amendment of the defences of Mid-Sussex and the architects.

By a judgment given on 25 July 1984 the Court of Appeal [1984] 1 W.L.R. 1274 (Lawton, Stephen Brown and Parker L.JJ.) allowed the

houseowners' appeal against Mid-Sussex, and also that of two of them against the architects. They dismissed the architects' appeal.

The appeal against Mid-Sussex was decided primarily on the issue whether there was proof of imminent danger to the health or safety of the occupants of the houses, as to which the Court of Appeal reached a different conclusion from that of the trial judge. There has been no appeal to this House on that issue, and no more need be said about it. The Court of Appeal also, however, in disposing of the appeals, decided in favour of the houseowners a number of points on the issue of limitation, and it is their decisions on these points which have given rise to the instant appeal to this House by the architects. The Court of Appeal granted leave to appeal here both to the architects and to Mid-Sussex, but the latter decided not to prosecute their appeal, and were represented before the House on the question of costs only, at the closing stages of the argument. The houseowners, being holders of a judgment against Hansel, the architects and Mid-Sussex jointly and severally, appreciated that even if the architects succeeded in their appeal they would still be in a position to recover the whole of their damages from Mid-Sussex, and consequently they were not represented for the purpose of argument on the merits of the architects' appeal, but lodged a case and appeared by counsel only in relation to costs. The result is that upon the merits of the appeal, which involve issues by no means easy of resolution, your Lordships have had the benefit of argument on one side only.

The issues which arise in connection with limitation are four in number; first, what was the date of joinder as defendants of the architects; second, whether the joinder of the architects as defendants is for limitation purposes to be related back to the date when the writ was originally issued against Hansel; third, whether leave to amend so as to raise the defence of limitation should have been granted as respects the whole of the proposed amendments or only as respects paragraphs (*a*), (*b*) and (*c*) of those amendments; and fourth, whether or not, assuming that leave should have been granted only as respects paragraphs (*a*), (*b*) and (*c*), i.e. to the effect of allowing a limitation defence to be pleaded solely on the "doomed from the start" basis, that defence succeeds.

I will consider the four issues in that order.

(1) *Date of joinder*

The houseowners obtained leave to join the architects and Mid-Sussex as additional defendants on 25 June 1982, but an effectively amended writ was not issued until 9 September 1982, and that writ was never served on the architects. The architects were, however, sent copies of an amended statement of claim, and they served defences to it dated 6 October 1982. There can be no doubt that by thus serving defences they waived the necessity of serving the amended writ on them. Assuming that the defences were served on the date which they bore, the architects became parties to the action at the latest on 6 October 1982. The question is whether by virtue of R.S.C., Ord. 15, r. 8(4) they must be taken to have become parties on 9 September 1982, the date when the effectively amended writ was issued. The relevance of the

question lies in the finding of the trial judge that the damage to the fifth plaintiffs' house occurred on 9 September 1976, precisely six years earlier.

It is to be observed at this stage that the Court of Appeal held that the trial judge had no power to declare, as he purported to do by his order of 18 January 1983, that Mid-Sussex and the architects were defendants from 30 July 1982. The houseowners did not appear before your Lordships to argue the contrary, and the decision was clearly correct.

R.S.C., Ord. 15, r. 8(4) provides:

> "Where by an order under rule 6 or 7 a person is to be added as a party . . . that person shall not become a party until—(*a*) where the order is made under rule 6, the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him . . ."

In the present case the order for joinder was made under rule 6.

The natural meaning of R.S.C., Ord. 15, r. 8(4)(*a*), according to the ordinary use of language, would appear to be that a person added as a defendant does not become a party until not only has the writ been amended but also the amended writ has been served upon him. But in *Seabridge v. H. Cox & Sons (Plant Hire) Ltd.* [1968] 2 Q.B. 46, upon the construction of an earlier version of the rule in the same terms, the Court of Appeal took a different view. The plaintiffs in an action for damages for personal injuries sought to add an additional defendant and obtained leave accordingly under R.S.C., Ord. 15, r. 6. Amended writs were filed and stamped at the central office under rule 8 on the third anniversary of the accident, but were not served on the new defendant (India Tyres Ltd.) until a few days later. The Court of Appeal held that the amended writs took effect, for limitation purposes, on the date of stamping, not that of service. Lord Denning M.R. said, at pp. 51-52:

> "The old rule, Order 16, r. 11, said that when a party is added, the proceedings against such party should 'be deemed to have begun only on the service of such writ.' If that rule had been the rule in existence today, I feel that the words would have compelled the court to hold that, as against India Tyres Ltd., the proceedings only began on 21 September 1967, that is, more than three years after the date of the accident and they would be entitled to the benefit of the Statutes of Limitation. But that rule has been altered. In 1962 the wording of it was changed. Again in 1964 it was changed once more. We have to construe the new rule, Order 15, r. 8(4). That says: 'Where by an order under rule 6'—that is, the one we are concerned with—'. . . a person is to be added as a party . . . that person shall not become a party until—(a) . . . the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him . . .'
>
> "Mr. Kidwell argued that this new rule has the same effect as the old rule. It means, he said, that the proceedings are not brought against the added defendant until he is served. That argument

convinced the master and the judge. They set aside the service. But I am unable to accept the argument. We must read the new rules as a whole. It seems to me that when the amendment is made in the prescribed manner, namely, by the amendment being taken to the Central Office and filed and the amended writ stamped, then at that moment the amended writ takes effect as against the added defendant. That procedure is equivalent to the issue of a writ against an original defendant. Once the amendment is made, the rules as to service apply as against the added defendant, just as they do to an original defendant on the issue of a writ: see Order 15, r. 8(2). The result is that the plaintiff has to serve the added defendant within 12 months from the date when the amendment is made.

"I am prepared to hold, therefore, that when an amendment is made adding a defendant, the amendment takes effect when it is stamped in the Central Office. It takes effect at that moment against that defendant equivalent to the issue of the writ against him. If the amendment is so made within the three years, it is in time, even though it is served later. In this particular case the amendment was just in time. It was on the very last day of the three years. This still leaves ample scope for Order 15, r. 8(4) when it says that 'that person shall not become a party until [he] has been served.' That only means that he is not affected by notices, and he cannot enter an appearance until he is served.

"We were referred to the county court rule, which is the same as the old Order 16, r. 11. That has not been amended. In the county court, therefore, the old position may prevail. But in the High Court I think a better rule now prevails. The amendment takes effect when it is stamped in the Central Office.

"Mr. Kidwell was forced to concede that, if the plaintiffs had issued another writ on 18 September 1967 on India Tyres Ltd., it would undoubtedly be in time, even though it was served later. I think it should be the same when they add them as defendants by amendment on that day. In good sense there ought to be no difference. On a broad and liberal interpretation of the rules, there is no difference."

Diplock L.J. agreed and so did Salmon L.J., albeit with some hesitation. That was a very powerful court, but with the greatest respect to it, I have been unable to accept the reasoning of Lord Denning M.R. as convincing. In my opinion the plain language of the rule must prevail, and the *Seabridge* case should be overruled as wrongly decided.

It follows that the architects were not validly joined as defendants until they lodged defences on 6 October 1982, more than six years after damage to the fifth plaintiffs' house occurred on 9 September 1976.

(2) *Relation back*

It has long been a rule of practice that amendment should not be allowed for the joinder of an additional defendant in a situation where a relevant period of limitation has already expired in relation to the cause

of action against him. The reason for that rule of practice is, however, debatable. One theory is that an additional defendant, joined unconditionally, becomes a party to the action as from the date of issue of the writ against the original defendant, that is to say, that joinder is related back to that date. That being so, it would be unjust to join him as a defendant at a time when limitation has run in his favour, because to do so would have the effect of depriving him of a valid defence. This theory has the support of a long line of authority in the Court of Appeal, which was examined by Stephenson and Brandon L.JJ. in *Liff v. Peasley* [1980] 1 W.L.R. 781. In that case the correctness of the theory was challenged by the citation of an old case in this House, *Byron v. Cooper* (1844) 11 Cl. & Fin. 556. Brandon L.J. expressed the opinion, obiter, that the relation back theory was incorrect. He considered the true basis of the rule of practice to be that no useful purpose would be served by joining an additional defendant at a time when limitation had run in his favour, because he was not to be deemed to have become a party at any earlier date than the actual date of joinder, and therefore would have an unanswerable defence.

In the present case, if the relation back theory is correct, the result is that the joinder of the architects would date back to 27 May 1980, when the writ was originally issued against Hansel. Limitation would therefore not be a good defence to any cause of action that arose after 27 May 1974, and since all the plaintiffs purchased from Hansel in 1975 the defence raised by paragraphs (c) and (d) of the proposed amendments would be bound to fail. The Court of Appeal held that they were bound by authority to accept the relation back theory, and accordingly that amendment in terms of these paragraphs should not have been allowed.

The Limitation Act 1939, which was applicable at the material time, provides by section 2(1):

> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—(*a*) actions founded on simple contract or on tort; . . ."

A cause of action is necessarily a cause of action against a particular defendant, and the bringing of the action which is referred to must be the bringing of the action against that defendant in respect of that cause of action. The causes of action here against Mid-Sussex and the architects were separate and distinct from the cause of action against Hansel. In my opinion there are no good grounds in principle or in reason for the view that an action is brought against an additional defendant at any earlier time than the date upon which that defendant is joined as a party in accordance with the rules of court. Further, I consider *Byron v. Cooper*, 11 Cl. & Fin. 556 to constitute clear authority in this House against the relation back theory. That was a case under the Tithes Act 1832 (2 & 3 Will. 4, c. 100), which by section 1 provided for shortening of the time required for establishment of a claim to inter alia exemption from tithes. Section 3 provided:

> "That this Act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be

A hereafter commenced, during the present session of Parliament, or within one year from the end thereof."

The rector of a parish filed a bill for an account of tithes against five defendants before the expiry of the time so limited, and after the expiration of that time the bill was amended by order of the court so as to add a further four defendants. The House held that the latter were B not deprived of the protection of section 1 of the Act of 1832. Lord Brougham said, at p. 579:

> "The first miscarriage in the court below, however, was to consider the whole defendants to the suit, the whole nine appellants, as excluded from the operation of the Act. The ground of this opinion was that the bill being originally filed before 16 August 1833, and C the four last-named appellants being, under an order of the Court of Exchequer, made defendants to that same bill, were as much excluded by section 3 of the Act as if they had been made originally defendants to the bill filed on 5 August 1833. This is as great and as manifest an error as could well be committed."

D and later, at pp. 579-580:

> "The parson is permitted to add new defendants to his amended bill, in order to save delay and expense; but each defendant so added is to be considered as sued by the proceeding which makes him a defendant, and the date of his being added is the date of the suit's commencement quoad him; consequently the four last-named E and last-added defendants in this case were only sued in November 1834, and quoad them the bill and the suit bear the date of November 1834. They do not fall, therefore, within the description of section 3 of the statute. They are not defendants, to use the words of that statute, 'in a suit or action commenced within one year' after 16 August 1832, being the last day of the session in which the Act passed."

F

Although the wording of section 2(1) of the Limitation Act 1939 naturally differs from that of section 3 of the Tithes Act 1832, that difference is not such as to demonstrate an intention that a defendant brought into an action by amendment, in respect of a cause of action separate from that against an existing defendant, should be treated as G having had the action brought against him at the same time as it was brought against the latter.

Accordingly, I find myself in respectful agreement with the provisional view expressed by Brandon L.J. in *Liff v. Peasley* [1980] 1 W.L.R. 781, 804, that the "no useful purpose" theory, and not the "relation back" theory, is the true basis of rule of practice to which I have referred.

It follows that, contrary to the view taken in the Court of Appeal, H the date of joinder of the architects does not fall to be related back to 27 May 1980, and that the Court of Appeal was wrong to disallow paragraphs (c) and (d) of the proposed amendments on the ground of such relation back.

(3) *Amendment*

Having regard to the conclusions I have reached upon the date of joinder issue and the relation back issue, and irrespective of the dates upon which the houseowners' causes of action against the architects are taken to have arisen, there can be no doubt that on 6 October 1982, when the architects effectively became defendants to the action, they had available to them a cast-iron defence of limitation. Whatever view be taken as to the dates when the causes of action arose, these dates must all have fallen more than six years before 6 October 1982. The latest possible dates were in late August and early September 1976, when damage to the houses first occurred. These were the dates picked on by paragraph (d) of the proposed amendments.

The Court of Appeal decided that irrespective of the relation back aspect paragraph (d) of the proposed amendments should not have been allowed. Lawton L.J. said [1984] 1 W.L.R. 1274, 1285:

> "It would be convenient, in my opinion, to start the unravelling of this surprising mish-mash of legal issues by considering the procedural ones. The first in point of time, and importance, is that raised by the amendments which were allowed on 10 December 1982. On that date the local authority and the architects learned that they might have a limitation defence which they had not known about before, that is to say the houses might have been 'doomed from the start.' This is what they then wanted to plead. Nothing more. They told the judge that they did not want to plead that the claims had been statute-barred when they were joined as defendants. They could have done so and, as I have already commented, if they had, on the evidence, they could have argued that the foundations had settled when or shortly before the cracks appeared. Paragraph (d) of the amendments which were allowed was in substance nothing more than what could have been put into the defences served but which was not. In my judgment, an amendment in terms of paragraph (d) should not have been allowed. The amendments allowed in paragraphs (a), (b), and (c) were of a different kind. The local authority and the architects and their advisers had had no reason to think before 10 December 1982 that a cause of action could accrue if a house were erected which, due to negligent design or construction, was 'doomed from the start.' They wanted that issue tried and, in my judgment, they were entitled to have it tried, provided that the plaintiffs were not prejudiced by a late amendment. They were not because they were given an opportunity of adducing more evidence. They decided not to take advantage of that opportunity."

Stephen Brown L.J. agreed with him. Parker L.J. said, at pp. 1292–1293:

> "if . . . the correct date for the purposes of limitation is 9 September 1982, I would allow the appeal as to sub-paragraph (d) of the amendment. It was clearly granted by the judge upon a mistaken view of the situation and the fact that leave to amend is discretionary is therefore of no significance. In the circumstances of the case, no amendment should be allowed."

A Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles. In his interlocutory judgment of 10 December 1982, allowing the proposed amendments, Judge Hayman set out and quoted at some length from the classical authorities on this topic. The rule is that amendment should be allowed if necessary to enable the true issues in B controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs. In *Clarapede & Co. v. Commercial Union Association* (1883) 32 W.R. 262, 263, Brett M.R. said:

> "The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however C late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made."

D The sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case than he would have been in if his opponent had pleaded the subject-matter of the proposed amendment at the proper time. If he would suffer no prejudice from that point of view, then an award of costs is sufficient to prevent him from suffering injury and the amendment should be allowed. It is not a relevant type of prejudice that E allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed. In my opinion, no sensible distinction is to be drawn for this purpose between an amendment seeking to plead limitation and any other sort of amendment. I am not aware of any authority for drawing such a distinction, nor have I experience of any practice to that effect.

F In the present case Judge Hayman allowed the proposed amendments believing, as did at the time counsel who proffered the amendments, that the decision of this House in the *Pirelli* case [1983] 2 A.C. 1 offered some prospect of a limitation defence which, owing to the time element, would not have been available under the law as it was understood to be prior to that decision. The effect of the decision was to set back, in some cases at least, the date at which the limitation period started to G run. It is to be noted that in their original pleadings the houseowners had made averments as to the date of the first defect in the houses "becoming apparent." By amendment in answer to those allowed by the order of 10 January 1983 they altered that to "occurring." So the ground upon which Judge Hayman allowed the amendments was that it had come to counsel's notice because of *Pirelli*, that they might have a limitation defence which it had not previously occurred to them that H they might have. At that time counsel appear to have been unaware of the procedural blunders which had led to their clients not having been joined as defendants until a date which, upon the law as it then stood under the *Seabridge* case [1968] 2 Q.B. 46, was capable of being

identified as 9 September 1982. There does not seem to be any question of an earlier deliberate decision, taken in knowledge of these blunders, not to plead limitation. In his interlocutory judgment of 18 January 1983 Judge Hayman stated that at the hearing of the application to amend all counsel apparently took the date of joinder to have been 25 June 1982. It may be inferred that if they had known of the blunders counsel would have pleaded limitation from the outset. One of the reasons given by Judge Hayman, in that interlocutory judgment, for backdating the joinder of Mid-Sussex and the architects, was that counsel for these parties had disclaimed on 10 December 1982 any intention of arguing that the houseowners' claims would be time-barred apart from *Pirelli*, and that in these circumstances it would be unjust to the plaintiffs to hold that these parties should be discharged at least as regards the first four plaintiffs (the evidence being that the damage to the fifth plaintiffs' home occurred on 9 September 1982), because these parties had in some way waived any right they might have had to be discharged, through not having applied to have their joinder set aside. It is not altogether easy to follow the reasoning of the judge. The fact that counsel have overlooked the availability of some defence does not mean that they have elected not to pursue it. Mid-Sussex and the architects had the opportunity to lodge defences only some three months before the trial started. By lodging defences they must be taken to have waived the procedural irregularities to the effect of being properly joined when they did so, which in the case of the architects, was 6 October 1982. But if, having discovered the true position, they had proposed to amend in order to plead limitation at any time up to the start of the trial, it is clear that they could not reasonably have been refused leave to do so. When the amendments were actually proffered, during closing speeches towards the end of the trial, it was a matter for very careful consideration whether allowance of them would result in any prejudice to the plaintiffs beyond what could be compensated by an award of expenses. That would be so whether the proffer of the amendments was prompted by the *Pirelli* case or by the late discovery of an extraordinary and hitherto unsuspected series of procedural blunders. The effect on the plaintiffs by way of prejudice or lack of it was exactly the same in either case. In the event Judge Hayman was told about the discovery of the blunders, and that counsel for the second and third defendants now wished to rely not only on the "doomed from the start" argument but also upon a limitation defence based on a period starting when the damage to the houses actually occurred, on 13 December 1982. He then neither recalled his order of 10 December nor altered it so as to exclude paragraph (d) of the proposed amendments, though at that stage and in those circumstances it would clearly have been competent for him to have done so. It does not seem to have occurred to counsel for the plaintiffs to invite him to take that course. If he had been so invited, he might in my opinion, in the light of all the circumstances, have reasonably and properly exercised his discretion against excluding paragraph (d). I do not consider that the interlocutory judgment of 18 January 1983 can be read as indicating that he would not have done so.

A The judgments in the Court of Appeal on this issue do not canvass the principles to be applied in the exercise of the discretion to allow or disallow late amendments. They do not allude to the short period of time which elapsed between the second and third defendants being given the opportunity to lodge defences and the commencement of the trial, nor to their counsel having informed Judge Hayman on 13 December 1982 of their altered position in the light of their discovery of the B procedural blunders. They do not allude to any practice of disallowing late amendments designed to raise a defence of limitation. Upon the whole matter I am of the opinion that the very brief reasons given by the Court of Appeal for their decision do not indicate that they had due regard to the applicable principles and to all relevant circumstances. I would, therefore, hold that, in so far as they purported to exercise their C discretion afresh, their exercise of it was erroneous and capable of being corrected. I understand, however, that a majority of your Lordships have reached a different conclusion.

(4) *The "doomed from the start" argument*

The appellants' presentation of this argument involved two aspects. D In the first place it was maintained that the houseowners' respective causes of action accrued, not when the physical damage to their houses occurred, but when they became the owners of houses with defective foundations. It was argued that they then suffered economic loss because the houses were less valuable than they would have been if the foundations had been sound. The proposition that a cause of action in tort accrued out of negligence resulting in pure economic loss was E sought to be vouched by reference to *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520. That case was also cited in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 A.C. 1, in support of the argument that, since in that case there was economic loss when the chimney was built, the cause of action arose then. The argument was clearly rejected in the speech of Lord Fraser of Tullybelton concurred in by all the others of their Lordships who participated in the decision. At F p. 16, he expressed the opinion that a latent defect in a building does not give rise to a cause of action until damage occurs. In the present case there can be no doubt that the defects in the houses were latent. No one knew of their existence until damage occurred in the summer of 1976. This branch of the argument for the architects is, in my opinion, inconsistent with the decision in the *Pirelli* case, and must be rejected.

G In the second branch of the argument it was maintained that a distinction fell to be drawn between the case where the defect in a building was such that damage must inevitably eventuate at some time and the case of a defect such that damage might or might not eventuate. The former case was that of a building "doomed from the start" such as was in the contemplation of Lord Fraser of Tullybelton when he made reference to that concept in his dicta in the *Pirelli* case, at p. 16. In the H present case the houses were doomed from the start because the event showed that damage was bound to occur eventually. My Lords, whatever Lord Fraser may have had in mind in uttering the dicta in question, it cannot, in my opinion, have been a building with a latent defect which

must inevitably result in damage at some stage. That is precisely the kind of building that the *Pirelli* case was concerned with, and in relation to which it was held that the cause of action accrued when the damage occurred. This case is indistinguishable from the *Pirelli* case and must be decided similarly. The second branch of the architects' argument fails. I understand that all your Lordships agree.

My Lords, in view of the decision of the majority on the amendment issue, the appeal must be dismissed. The appellants will pay the costs of the respondents and of Mid-Sussex.

Lord Brandon of Oakbrook. My Lords, the five plaintiffs in the action in which this appeal arises were the purchasers in 1975 of houses which had been built on defective foundations. By reason of those defective foundations the houses later developed serious structural damage. The plaintiffs might have incurred very substantial costs in making good the defects and repairing the damage, but they chose instead to sell their houses at prices much reduced by the defects and damage concerned. Subsequently the five plaintiffs began an action to recover the losses which they had suffered by reason of these events. At first the plaintiffs sued the builders as sole defendants. Later they joined the local authority and the architects who designed the houses as second and third defendants respectively.

The action was tried by Judge Hayman, sitting as a deputy official referee. By an order made on 14 February 1983 he decided: (1) that all five plaintiffs succeeded against the first defendants; (2) that all five plaintiffs failed against the second defendants; (3) that the first, second and fifth plaintiffs succeeded against the third defendants; (4) that the third and fourth plaintiffs failed against the third defendants; and (5) that, as between the first and third defendants where both were liable, liability should be apportioned 60 per cent. to the first defendants and 40 per cent. to the third defendants. The judge further stated in his judgment that, if he had found the second defendants also liable to the plaintiffs he would, as between all three defendants, have apportioned liability 50 per cent. to the first defendants, 15 per cent. to the second defendants and 35 per cent. to the third defendants.

The third defendants appealed and the plaintiffs cross-appealed to the Court of Appeal [1984] 1 W.L.R. 1274 (Lawton, Stephen Brown and Parker L.JJ.). By the order of that court dated 25 July 1984: (1) the third defendants' appeal against so much of the judge's order as made them liable to the first, second and fifth plaintiffs was dismissed; (2) the cross-appeal of all five plaintiffs against so much of the judge's order as dismissed their claims against the second defendants was allowed; (3) the cross-appeal of the third and fourth plaintiffs against so much of the judge's order as dismissed their claim against the third defendants was also allowed; (4) liability as between the three defendants was apportioned 50 per cent. to the first defendants, 15 per cent. to the second defendants and 35 per cent. to the third defendants; and (5) leave was given to both the second and third defendants to appeal to your Lordships' House.

Appeals to your Lordships' House were initiated by both the second and the third defendants, but the former later withdrew their appeal. The result of such withdrawal was that the plaintiffs, who by the order of the Court of Appeal had a judgment in their favour against the second defendants, ceased to have any interest in the outcome of the third defendants' appeal. The consequence of that was that, so far as the substance of the third defendants' appeal is concerned, your Lordships heard only counsel for them, with no opposition on behalf of either the plaintiffs or the second defendants. Counsel for these two latter parties were, however, heard on the subject of costs.

My Lords, four questions arise on this appeal. The first question is when did the plaintiffs' causes of action against the third defendants accrue. The second question is when was action brought by the plaintiffs against the third defendants. The third question is whether, having regard to the answers to the first and second questions, the plaintiffs' claims against the third defendants were time-barred. The fourth question is whether, the trial judge having allowed a very late application by the third defendants for leave to amend their defence by adding a plea that the claims against them were time-barred, the Court of Appeal was right to disallow a crucial part of that amendment. I shall call these four questions the accrual issue, the joinder issue, the time-bar issue and the amendment issue respectively, and I shall consider them in the order in which I have stated them. Before doing so, however, it will be convenient to draw attention to a decision of your Lordships' House which was given at a time when the trial of the present action had reached a very late stage, and had an important bearing on the course which the trial then took. That decision is *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 A.C. 1, which was given on 9 December 1982.

The decision in the Pirelli case

It was held by the Court of Appeal in *Sparham-Souter v. Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 that the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building is the date when the damage is discovered or could with reasonable diligence have been discovered. In the *Pirelli* case your Lordships' House held that this decision of the Court of Appeal was wrong and that the date of accrual of the cause of action was the date when the damage resulting from the negligent design or construction first came into existence. Lord Fraser of Tullybelton, who delivered the leading speech in that case, while holding that the general rule was that which I have just stated, referred in two passages in his speech to the possible existence of special cases in which a building might be regarded as so defective as to be "doomed from the start," in which event the date of accrual of the cause of action might be the date when the building was constructed. These passages, however, were not necessary to the decision of the appeal and were therefore no more than obiter dicta.

The accrual issue

The Court of Appeal, applying the ground of decision in the *Pirelli* case, held that the plaintiffs' causes of action against the third defendants accrued at the various times when the structural damage to their houses, consequential on their originally defective foundations, first came into existence. The court rejected the contention put forward for the third defendants that the houses were "doomed from the start," and that, on the basis of the observations of Lord Fraser of Tullybelton in the *Pirelli* case to which I referred earlier, the plaintiffs' causes of action accrued when the houses were built. This contention was renewed by the third defendants before your Lordships' House. The argument of counsel, as I understand it, proceeded as follows. Where a house was built on defective foundations, a buyer of it might suffer two kinds of damage. The first kind of damage was physical, in the form of consequential structural failure or damage. The second kind of damage was economic loss, in the form of diminution in market value. In the case of the first kind of damage, the buyer's cause of action against any party for negligence in respect of the defective foundations accrued when the consequential structural failure or damage occurred. But, in the case of the second kind of damage, the diminution of market value was present from the time of the original construction, and it was at that earlier time that the buyer's cause of action in respect of such diminution accrued. The plaintiffs in the present case had sued for the second kind of damage, namely, diminution of market value. Their causes of action had, therefore, accrued at the date when the houses were built.

In my opinion this contention cannot be supported. I do not know what special cases Lord Fraser of Tullybelton had in mind when he referred in his speech in the *Pirelli* case to buildings "doomed from the start." It may be that he was only keeping open the possibility of the existence of such special cases out of major caution. Be that as it may, however, I am quite sure that he was not seeking to differentiate between causes of action in respect of making good defects or damage on the one hand, and causes of action in respect of diminution in market value on the other. In any case, on the facts of the present case it seems that the plaintiffs, in re-selling their houses at a loss, were acting reasonably in mitigation of their damage, so that the distinction between the two kinds of damage relied on is one of form rather than substance.

In my view there is nothing in the facts of the present case which would take it out of the general principle laid down in the *Pirelli* case and put it into some special class of case, if there be one, of buildings "doomed from the start."

It follows that I would answer the first question by saying that the plaintiffs' causes of action against the third defendants accrued at the dates on which the consequential structural damage to their houses first came into existence.

The time of joinder issue

My Lords, the unhappy course of the plaintiffs' action, so far as the joinder of the second and third defendants is concerned, is set out fully

A and clearly in the judgment of Lawton L.J. in the Court of Appeal [1984] 1 W.L.R. 1274, 1281-1284, and I do not think that it is necessary for me to recount it in detail again here. The outcome of it all was that, although the plaintiffs obtained leave to join the local authority and the architects as additional defendants on 25 June 1982, no effectively amended writ was issued until 9 September 1982, and even then it was never served on the new parties. The latter, however, were sent copies B of the amended statement of claim and later served defences to it without waiting for any amended writ to be served on them. The defence of the second defendants is undated; that of the third defendants was served on 6 October 1982. By serving defences in this way the second and third defendants waived the service on them of the amended writ, and in the case of the third defendants they must be taken to have C done so on the date of service of their defence, that is to say on 6 October 1982.

Leave to join the local authority and the architects as additional defendants had been given under R.S.C., Ord. 15, r. 6. Ord. 15, r. 8(4) provides:

> "Where by an order under rule 6 or 7 a person is to be added as a D party . . . that person shall not become a party until—(*a*) where the order is made under rule 6, the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him . . ."

My Lords, in my opinion the plain effect of this rule is that defendants added under R.S.C., Ord. 15, r. 6, become parties to the E action in which they are joined when, and only when, an amended writ is served on them. In *Seabridge v. H. Cox & Sons (Plant Hire) Ltd.* [1968] 2 Q.B. 46, the Court of Appeal (Lord Denning M.R. and Diplock and Salmon L.JJ.) held that, on the true construction of an earlier rule in the same terms, a writ amended to join an additional defendant took effect from the time when it was stamped in the central office, and that the provision that an added defendant shall not become F a party until the amended writ has been served on him only meant that he was not affected by notices and could not enter an appearance until he has been served. With great respect to the exceptionally distinguished judges who constituted the Court of Appeal on that occasion, I cannot agree with their interpretation of the rule, which appears to me to be contrary to the plain language of it. I would, therefore, hold that the G *Seabridge* case was wrongly decided and should be overruled.

For the reasons which I have given, I am of opinion that the third defendants did not become parties to the action, and were not therefore effectively joined, until 6 October 1982.

The time-bar issue

H My Lords, the Court of Appeal held that the joinder of the second and third defendants, which they regarded as having occurred on 9 September 1982, the date of issue of the amended writ, once it had been made related back to the date of the original writ. They so held because

they regarded themselves as bound by previous decisions of the Court of Appeal to do so.

It was common ground that, despite the passing of the Limitation Amendment Act 1980 (c.24) and the Limitation Act 1980 (c.58), the Limitation Act 1939 applied to the action in this case. The reason for this is that the action was begun on 27 May 1980 before either of the Acts of 1980 had come into force. Section 2(1) of the Limitation Act 1939 provides:

> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—(*a*) actions founded on simple contract or on tort; . . ."

The question, therefore, is when was action brought by the plaintiffs against the third defendants within the meaning of section 2(1) above. In my opinion, there can be only one answer to that question: it was when the third defendants, by waiving service on them of the amended writ, first became parties to the action, that is to say on 6 October 1982.

The theory that, at common law and apart from anything in either of the Acts of 1980, the joinder of a defendant to an existing action relates back to the date of the original writ was examined in depth by a two-judge Court of Appeal in *Liff v. Peasley* [1980] 1 W.L.R. 781. Stephenson L.J. was one of the two judges and I was the other. That case proceeded on the basis, which is not open to question, that there was an established rule of practice prohibiting the joinder by amendment of an additional defendant after the expiration of a relevant period of limitation in his favour. The question discussed in the judgments, however, was whether that rule of practice was founded on the concept of relation back (the relation back theory), in that to allow such joinder would deprive the added defendant of an accrued defence, or on the concept that to allow such joinder would serve no useful purpose (the no useful purpose theory), in that the added defendant would, if joined, have an unanswerable defence of time-bar. It was not necessary for the disposal of that case to decide finally which of these two concepts was correct. However, in the judgment which I gave I expressed a strong provisional view that the rule of practice was founded on the no useful purpose theory and not on the relation back theory, and I gave what appeared to me to be convincing reasons for that view. While it is more appropriate for the rest of your Lordships than for me to decide whether the provisional view which I expressed in *Liff v. Peasley* is correct or not, I stand by that view and the reasons which I gave for holding it. It follows that I consider that the Court of Appeal was wrong to accept and apply the relation back theory in this case.

With the relation back theory out of the way, it is clear on the findings of fact of the judge that the structural damage to the houses complained of occurred more than six years before 6 October 1982, which is the date on which I have held that action was first brought by the plaintiffs against the third defendants. It follows that the plaintiffs' claims were by then time-barred.

The amendment issue

My Lords, the decision in the *Pirelli* case [1983] 2 A.C. 1 was given, as I indicated earlier, on 9 December 1982. By then the trial was nearing its end with counsel making their final speeches. On 10 December 1982 counsel for the third defendants, having become aware of the decision in the *Pirelli* case, applied to the judge for leave to amend the third defendants' defence by raising a plea of limitation. He subsequently put before the judge a draft of the proposed amendment, which involved adding to the existing defence of the third defendants a new paragraph 3A in these terms:

> "Further or alternatively the plaintiffs' claims are statute-barred by reason of the following facts or matters:
>
> *"PARTICULARS*
>
> "If (which is denied) the third defendant was guilty of negligence or breach of statutory or other duty whether as alleged or at all, time for the purposes of the Limitation Acts began to run on the occurrence of one of the following events:
>
> "(a) The submission to and/or approval by the local authority for building regulations purposes of the plans drawn by the third defendants and/or the approval by such authority of the excavations and/or foundations at the plaintiffs' premises allegedly constructed in reliance upon the said plans, whereby the homes or back of them were defectively designed and/or built as alleged by the plaintiffs.
>
> "(b) The defective construction and/or completion of the houses and/or of their foundations, as alleged by the plaintiffs.
>
> "(c) The purchase by the plaintiffs and each of them of their respective houses, designed and/or constructed defectively as alleged by the plaintiffs.
>
> "(d) The settlement of the foundations wholly or in part or other movement or damage at the said houses caused or contributed to by the defective design and/or construction as alleged by the plaintiffs.
>
> "The third defendants will contend that each of the events above mentioned occurred more than six years prior to the joinder of the third defendants."

Counsel for the second defendants also applied for leave to make a similar amendment at the same time.

It will be observed that there is a fundamental distinction between paragraphs (a), (b) and (c) of the above particulars on the one hand and paragraph (d) on the other. Paragraphs (a), (b) and (c) were designed to enable the third defendants to contend that the houses, the subject-matter of the action, came within the special category of buildings "doomed from the start," as contemplated by Lord Fraser of Tullybelton in the observations made by him in the *Pirelli* case to which I referred earlier. On that basis the third defendants wished to contend that the plaintiffs' cause of action against them accrued when the houses were built or even earlier, with the result that, even if the doctrine of relation back applied, such cause of action was already time-barred when the original writ was issued. By contrast, paragraph (d) was designed to

enable the third defendants to contend, in reliance on the ground of decision in the *Pirelli* case, that the plaintiffs' cause of action against them accrued when the structural damage to the houses first came into existence. On that basis they might also succeed in a defence of limitation, but only if they could persuade the judge that, having regard to *Liff v. Peasley*, the doctrine of relation back did not apply. It is material to add that, on the facts as found by the judge, paragraph (d) would have served the third defendants just as well for this purpose if the plaintiffs' cause of action against them were treated as having accrued at the time laid down in *Sparham-Souter v. Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858, namely, the time when the structural damage was discovered or could with reasonable diligence have been discovered. The significance of this is that a plea analogous to that made in paragraph (d), but based on the *Sparham-Souter* case instead of the *Pirelli* case, could readily have been included in the third defendants' defence at a much earlier stage of the proceedings and certainly well before trial.

The second and third defendants' applications to amend their defence were, as might have been expected, strongly opposed by the plaintiffs. The judge, however, in a reasoned judgment of considerable length, decided to allow them on terms that the second and third defendants should pay the plaintiffs' costs of the amendment and of the adjournment which he directed should follow it in any event. In his judgment the judge said:

> "I now have before me a draft amended defence from Mr. Cordara on behalf of the third defendants. Of the relevant sub-paragraphs, (a), (b) and (c) relate to the 'doomed from the start' point. Sub-paragraph (d) is based on the ratio decidendi of the *Pirelli* case."

That statement was, so far as it went, entirely correct.

With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to R.S.C., Ord. 20, r. 5, in *The Supreme Court Practice 1982* and to the authorities there cited. The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

Guiding himself by the authorities, the effect of which I have summarised above, the judge decided, not without some doubt and

hesitation, to allow the proposed amendments. The further hearing of the case was adjourned to the beginning of the following term.

On 18 January 1983 the judge, on the application of the plaintiffs, made an order that the joinder of the second and third defendants should take effect from 30 July 1982. The Court of Appeal rightly held that the judge had no jurisdiction to make such an order and the making of it can therefore be disregarded. It is, however, material to refer to certain passages in the judgment, again of considerable length, which the judge gave when making the order. In his judgment the judge said:

> "On Thursday 9 December 1982 the House of Lords delivered judgment in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 A.C. 1. That judgment caused a stir, to say the least, in the present case. On Friday 10 December application was made by the second and third defendants to amend their defences in order to plead limitation in the light of the *Pirelli* judgment.
>
> "At the time of the application, both Mr. Cordara and Mr. Brunner [counsel for the third and second defendants respectively] made it plain that neither of them was seeking to say that the claims were statute-barred . . . under the law as it was understood to be before the *Pirelli* judgment, the law as laid down in *Sparham-Souter v. Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858, C.A.
>
> "The matter was fully argued on that basis, and in the event I gave leave to these two defendants to amend their defences.
>
> "Some reference was made at the time to the date of the order giving leave to join the second and third defendants which was 25 June 1982. It would seem that the matter was further investigated over that weekend, because by Monday 13 December Mr. Cordara and Mr. Brunner had apparently changed their minds. (I imagine that over the weekend it was discovered, or appreciated for the first time, that the actual joinder was not effected until 9 September 1982). Mr. Symons [counsel for the plaintiffs] informed me on that Monday morning that Mr. Cordara and Mr. Brunner wished to argue that the claims were statute-barred in any event as the cracks had appeared over six years before the date of joinder."

My Lords, three matters appear to me to emerge from this part of the judge's judgment. First, the judge gave leave to re-amend on 10 December 1982 after being told by counsel for the second and third defendants that they were not seeking to say that the claims against them were statute-barred in any event, that is to say even on the basis of the law as it was thought to be before the *Pirelli* case. Secondly, on 13 December the judge was told by counsel for the plaintiffs that counsel for the second and third defendants had resiled from what they had said to the judge in this respect on Friday 10 December. Thirdly, despite counsel for the second and third defendants having resiled in this manner, the judge did not consider that their doing so gave him reason to disallow paragraph (d) of the amendment, which he could well, if he had thought it right, have done.

The Court of Appeal took a different view about paragraph (d) of the amendment. Lawton L.J., after explaining the various issues in the case, said [1984] 1 W.L.R. 1274, 1285:

> "It would be convenient, in my opinion, to start the unravelling of this surprising mish-mash of legal issues by considering the procedural ones. The first in point of time, and importance, is that raised by the amendments which were allowed on 10 December 1982. On that date the local authority and the architects learned that they might have a limitation defence which they had not known about before, that is to say the houses might have been 'doomed from the start'. This is what they then wanted to plead. Nothing more. They told the judge that they did not want to plead that the claims had been statute-barred when they were joined as defendants. They could have done so and, as I have already commented, if they had, on the evidence, they could have argued that the foundations had settled when or shortly before the cracks appeared. Paragraph (d) of the amendments which were allowed was in substance nothing more than what could have been put into the defences served but which was not. In my judgment, an amendment in terms of paragraph (d) should not have been allowed. The amendments in paragraphs (a), (b) and (c) were of a different kind. The local authority and the architects and their advisers, had had no reason to think before 10 December 1982 that a cause of action could accrue if a house were erected which, due to negligent design or construction, was 'doomed from the start'. They wanted that issue tried and, in my judgment, they were entitled to have it tried, provided that the plaintiffs were not prejudiced by a late amendment. They were not because they were given an opportunity of adducing more evidence. They decided not to take advantage of that opportunity."

Stephen Brown L.J. said, at p. 1291, that he agreed with the judgment of Lawton L.J. Parker L.J. said, at p. 1292:

> "If, upon joinder, there is a relation back as, in common with the judgment given by Lawton L.J. and for his reasons, I hold that there is, any amendment seeking to raise limitation in respect of any cause of action accruing after 26 May 1974 ought to be and to have been refused, because any such amendment would be purposeless. It would inevitably fail. Since none of the plaintiffs purchased until 1975, it follows that sub-paragraphs (c) and (d) of the amendments should not, in any event, have been allowed."

The situation, therefore, is that three separate reasons were given in the Court of Appeal for disallowing paragraph (d) of the amendments. The first reason, relied on by Lawton and Stephen Brown L.JJ., was that, when the application for leave to amend was made on 10 December 1982 counsel for the second and third defendants had told the judge that they did not wish to plead that the claims against them had been statute-barred in any event, that is to say even on the basis of the law as it was understood to be before the *Pirelli* case [1983] 2 A.C. 1. The second

reason, also relied on by Lawton and Stephen Brown L.JJ., was that the plea raised by paragraph (d) was in substance a plea which could have been raised, on the basis of the law as it was understood to be before the *Pirelli* case, when the defences were first served, but had not been so raised. The third reason, relied on by Parker L.J., was that, because of the relation back theory, paragraph (d) of the amendment was bound to fail and was therefore purposeless.

With regard to the first reason it is true that, when counsel for the second and third defendants applied for leave to amend on Friday 10 December 1982, they told the judge that they did not wish to argue that the claims against them were statute-barred even on the basis of the law as it was thought to be before the *Pirelli* case. However, as I pointed out earlier, by reference to what the judge said later on the occasion of the plaintiffs' misconceived application for an order back-dating the joinder of the second and third defendants, the judge was informed by counsel for the plaintiffs on Monday 13 December 1982 that counsel for the second and third defendants had changed their minds in this respect, and now did wish to argue that the claims against them were statute-barred even on the basis of the law as it was understood to be before the *Pirelli* case. I pointed out further that, despite the judge having been informed of this change of intention, the judge did not see fit to revoke his previous allowance of paragraph (d) of the amendments, as he would certainly have been entitled to do. In the result, while it may be right to say that the judge allowed paragraph (d) of the amendments originally on a basis which subsequently proved to be incorrect, he nevertheless adhered to his original decision, instead of revoking it, after being informed of the true position. In so far, therefore, as the first reason relied on in the Court of Appeal is that, when the judge allowed paragraph (d) of the amendments on 10 December 1982, he was misled as to its purpose, it seems to me clear that, after all misapprehension in that respect had been removed by what he was told on 13 December 1982, he nevertheless stood by his previous decision. In these circumstances I do not consider that there is any real substance in the first reason relied on in the Court of Appeal.

With regard to the second reason, it amounts to no more than this, that the second and third defendants made a serious mistake in the conduct of their cases by not raising a plea of limitation in their original defences. On the authorities, to the effect of which I referred earlier, this circumstance ought not to be regarded as of itself precluding the giving of leave to amend, in the absence of any prejudice to the plaintiffs which could not be compensated for by appropriate orders as to costs. I cannot see that there was any such prejudice.

With regard to the third reason, I have already expressed my opinion that the relation back theory is not well-founded, and, if I am right about that, it follows that the third reason is not well-founded either.

The opinion which I have formed on this part of the case is that, having regard to the authorities to which the judge referred in his judgment, he had a discretion, when he was properly informed about the purpose of paragraph (d) of the amendments on 13 December 1982, to let stand the order relating to it which he had made, on a partly

mistaken basis, on 10 December 1982. I stress that I think that he had a discretion to do this: I do not go so far as to say that he was bound to do so.

On the footing that the judge had a discretion to allow paragraph (d) of the amendment to stand, I do not consider, for the reasons which I have given, that the Court of Appeal were justified, on any of the three grounds relied on by them, to interfere with the exercise of that discretion.

Conclusion

The result of the view which I have expressed on the four issues which I set out earlier is that the third defendants were entitled to rely on limitation as a defence to the plaintiffs' claims, and that they were entitled to succeed in that defence. It follows that I would myself allow the third defendants' appeal.

I understand, however, that a majority of your Lordships have reached a conclusion different from mine on what I have called the amendment issue, being of the opinion that the Court of Appeal were right to disallow paragraph (d) of the particulars under paragraph 3A of the third defendants' amended defence. Having regard to the views which I have expressed on what I have called the accrual issue, the third defendants' defence of limitation can only succeed if they are allowed to rely on paragraph (d). It follows that, if as a result of the majority view of your Lordships paragraph (d) is disallowed, the third defendants' appeal, instead of succeeding as I think that it should, must fail.

Lord Templeman. My Lords, the houses were negligently designed and sited by the fourth party architects. The houses were negligently constructed by the defendant builders. The foundations of the houses were negligently inspected by the third party local authority. The houses were completed, purchased and occupied by the end of 1975. As a result of the negligence of the architects, the builders and the local authority, damage was sustained by the houses. According to the trial judge, the damage to no. 34 occurred about 4 August 1976 and was discovered on 11 August 1976. The damage to no. 32 occurred about 7 August 1976 and was discovered on 14 August 1976. The damage to no. 42 occurred about 2 September 1976 and was discovered on 9 September 1976. The damage to no. 36 was discovered on 11 August 1976. The damage to no. 38 was discovered on 3 September 1976.

Under the law as understood in the *Sparham-Souter* case [1976] Q.B. 858 the claims against the architects and the local authority were time-barred six years after the date when the damage was discovered, i.e. not later than 9 September 1982. Under the law laid down in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 A.C. 1 the claims against the architects and the local authority were time-barred six years after the date when the damage occurred, i.e. not later than 9 September 1982 unless the houses were "doomed" in which case time may have expired before 30 July 1982. The trial judge granted leave to plead the Limitation Act but he also ordered that the joinder of the third and fourth parties to the action was to take effect from 30 July 1982.

A The architects and the local authority now successfully contend that they were not joined in the action until 6 October 1982. But in my opinion they cannot have the benefit of that success and at the same time ignore the conditions which the trial judge imposed upon them. The architects and the local authority cannot have it both ways. If they were not joined in the action until 6 October 1982 then when they were joined, time had expired under the law as expounded in the *Sparham-Souter* case or as corrected in the *Pirelli* case. The architects and the local authority delivered their defences in October 1982. They did not plead the Limitation Act. They did not apply to amend their defences until 10 December 1982 after the trial had been completed save for closing speeches and judgment. The architects and the local authority now rely on the leave granted to them by the trial judge to rely on the C Limitation Act but they can only rely on his order to the extent to which it was intended. By backdating, ineffectually as it turned out, the joinder of the third and fourth defendants to 30 July 1982 the trial judge clearly intended to prevent any reliance on the Limitation Act save on the footing that the houses were "doomed."

I agree with my noble and learned friend, Lord Keith of Kinkel, about the date of joinder, the inappropriateness of relation back, and D the "doomed from the start" arguments. But for the reasons I have indicated, and in agreement with the views expressed by my noble and learned friend, Lord Griffiths, about the late amendment in order to plead the Limitation Act, I would dismiss this appeal.

LORD GRIFFITHS.

E My Lords,

The amendment of the defences

I am of opinion that there are no grounds that would justify interfering with the discretion exercised by the Court of Appeal to F disallow paragraph 3A(d) of the amendment of the third and fourth defendants' defences made on 10 December 1982. In order to explain my reasons it is necessary to set out the history of the litigation before the amendment.

By a writ dated 27 May 1980 the plaintiffs claimed damages against the first defendants, the builders, for breach of contract and/or negligence in the construction of houses which they had sold to the plaintiffs. By a G third party notice dated 28 April 1981 issued against the local authority, the Mid-Sussex District Council, the first defendants claimed to be indemnified against the plaintiffs' claim on the ground that the third party had negligently approved the foundations of the houses and granted building regulation consents in breach of their statutory duties. By a fourth party notice dated 18 August 1981 the third party claimed an indemnity against the fourth party, the architects of the houses, H alleging breach of duty to the plaintiffs.

The plaintiffs did not immediately join the third and fourth parties because they did not realise that the builders might be insolvent. By the summer of 1982, however, the plaintiffs had anxieties about the solvency

of the builders and so on 25 June 1982 they obtained an order that the third and fourth parties be joined as defendants to the action and that a statement of claim be served on them within 21 days. This order was unopposed by the solicitors for the third and fourth parties because as the law was understood at that time pursuant to the decision of the Court of Appeal in *Sparham-Souter v. Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858, the plaintiffs' causes of action were believed to arise when they first observed the damage to their houses. In the statement of claim it had been pleaded that the dates upon which the defects first became apparent fell between 11 August 1976 and 9 September 1976 and accordingly they all fell within the limitation period of six years and the third and fourth parties raised no objection to the order.

On 26 July 1982 the plaintiffs' solicitors went to the central office to have the amended specially endorsed writ stamped. The clerk in the central office refused to apply the stamp because the order of 25 June 1982 did not explicitly provide for the writ endorsed with the statement of claim to be amended. To overcome this difficulty the plaintiffs' solicitors wrote a letter dated 30 July 1982 to the third and fourth parties' solicitors enclosing an amended specially endorsed writ together with a draft consent order. Both solicitors returned the draft consent order duly endorsed. Upon 8 September 1982 the plaintiffs' solicitors obtained an order from Judge Newey in the following terms:

> "Upon reading the parties' agreed terms it is ordered that: the plaintiffs have leave to amend the statement of claim in the form annexed hereto."

On 9 September 1982 the writ was re-issued. On 17 September 1982 the plaintiffs' solicitors sent the third and fourth parties a copy of the order dated 8 September 1982. The plaintiffs' solicitors did not serve a copy of the re-issued amended writ on the third and fourth parties as they should have done, but nevertheless the third and fourth parties both delivered defences.

For the reasons given by Lord Keith of Kinkel, a defendant does not become a party until not only has the writ been amended but also the amended writ has been served on him. When the third and fourth parties delivered their defences they thereby waived the necessity for service of the amended writ and accordingly became parties to the action from the date of delivery of defence which in the case of the fourth party, the appellants, was 6 October 1982.

It will be observed from the chronology that at the time the fourth party delivered their defence they both knew that they had not been joined as defendants until 6 October because they had been asked to consent to the amendment of the writ on 30 July and on 17 September they had received a copy of the order dated 8 September which in fact gave leave to amend the writ. By the time they were joined, namely on 6 October 1982, over six years had elapsed since the date upon which it was pleaded that the plaintiffs first discovered the defects in their houses. But the third and fourth defendants did not plead by their defences that the claims were statute-barred. Whether this was deliberate

A or inadvertent, I do not know. The weight of authority at that time was in favour of the view that the joinder would relate back to the date of the original writ for the purpose of limitation and on that view of the law there would be no purpose in pleading the statute of limitations. On the other hand if they had wished to pursue the defence that the claims were time-barred because time ran until the date of joinder then they B had all the information necessary to enable them to do so. I cannot accept that they were in any way misled by the plaintiffs' failure to act as quickly as they might have done after they had obtained the order to join them as defendants on 25 June.

The trial of the action started on 23 November 1982 and lasted some two weeks during which the second and third defendants fought the claim on its merits. During the course of the plaintiffs' final speech an C application was made on behalf of the second and third defendants to amend their defences and raise a plea that the claims were time-barred pursuant to the statute of limitations. This application was occasioned by the publication of the decision of your Lordships' House in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners* [1983] 2 A.C. 1 which had been delivered on 9 December 1982.

D I will pause here to consider what would have been the fate of this application if the *Pirelli* decision had not been published during the course of the hearing. I have never in my experience at the Bar or on the Bench heard of an application to amend to plead a limitation defence during the course of the final speeches. Such an application would, in my view, inevitably have been rejected as far too late. A defence of limitation permits a defendant to raise a procedural bar E which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not F invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties. If both parties on this assumption prepare their cases to contest the factual and legal issues G arising in the dispute and they are litigated to the point of judgment, the issues will by this time have been fully investigated and a plea of limitation no longer serves its purpose as a procedural bar.

If a defendant decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back upon a plea of limitation as a second line of defence at the end of the trial when it is apparent that he is likely to lose on the merits. Equally, in my view, H if a defence of limitation is not pleaded because the defendant's lawyers have overlooked the defence the defendant should ordinarily expect to bear the consequences of that carelessness and look to his lawyers for compensation if he is so minded.

Mr. Ogden submitted that the authorities obliged a judge to allow an amendment no matter how late it was made nor for what reason provided the other party could be properly compensated by an award of costs. He relied upon the authorities set out in *The Supreme Court Practice* and in particular the decision of Brett M.R. in *Clarapede & Co. v. Commercial Union Association*, 32 W.R. 262, 263:

> "The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; . . ."

This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

I now turn back to the present case. The *Pirelli* decision showed that the plaintiffs' causes of action arose when the damage to their houses occurred and not when they first discovered the damage. The decision also raised the possibility that a cause of action might arise at a much earlier date if a building was "doomed from the start." If a plea of

limitation based upon an assumption that the cause of action arises at the date of discovery of the damage bars the claim it must follow that the plea will also bar the claim if it arises at the date of damage, because the date of damage must be earlier in time than the discovery of the damage. Therefore, if the third and fourth defendants had raised the plea of limitation based on the date of the discovery of the damage in their defences it would have been available to defeat the claim which arose on the date of the damage occurring. As I have already pointed out whether or not the plea succeeded depended upon whether the terminus ad quem for the purposes of limitation was October 1982, the date of joinder, or 27 May 1980, the date of the original writ. As in the circumstances of this case the damage, namely the cracks, must have occurred relatively shortly before they were discovered, the claim of limitation would succeed if October 1982 was the crucial date but fail if it was May 1980. The decision in the *Pirelli* case, therefore, in so far as it held that the cause of action arose at the date of the damage had no effect on any decision made by the defendants as to whether or not they should plead limitation nor on their failure to do so.

In these circumstances it is hardly surprising that when on 10 December 1982 the third and fourth defendants applied for leave to amend to raise the plea of limitation, they told the judge that they were not seeking leave to amend to allege that the claims were statute-barred in any event.

The possibility of arguing that these houses were "doomed from the start" did, however, introduce a new factor into the defence of limitation. The design and construction of the houses had begun over six years before the date of the original writ so that even if the date of the original writ was the terminus ad quem the claims might still be statute-barred. Taking the law as it stood before the decision in the *Pirelli* case, this possible defence of limitation could not reasonably have been expected to be in the minds of the defendants' legal advisers at the time the defences were settled. The first three amendments contained in sub-paragraphs (a), (b) and (c) all related to a defence of limitation based upon an allegation that the houses were "doomed from the start." The final amendment (d) was, however, in wider terms and permitted the defendants on the face of its wording to argue that even if the houses were not "doomed from the start" and the cause of action arose at the date of the damage they were all statute-barred by October 1982. It is, however, quite apparent that neither the judge at the time he allowed the amendment, nor the defendants when they applied for it, had any intention that such an argument should be received by the court. The defendants had said that they did not intend to argue that the claims were statute-barred in any event.

10 December was a Friday, and over the weekend I suspect that the third and fourth defendants' advisers awoke for the first time to the possibility that these claims might have been statute-barred at the time they were joined as defendants even under the law as it was previously understood. I say suspect because it may be that a conscious decision had been taken to accept that their joinder would relate back to the date of the original writ and it was, therefore, not worth pleading a time

bar. However that may be, the judge was informed on 13 December 1982 that the defendants now wished to argue that on the basis of amendment (d) the claims were time-barred in any event.

In order to give the parties an opportunity to consider the position the judge adjourned the case until the following term. The plaintiffs' counsel appreciating the danger that the claims might be statute-barred if it was held that the terminus ad quem was the date of joinder took out a summons seeking a declaration that the proceedings against the third and fourth defendants had commenced or were deemed to commence on or before 30 July 1982. The judge after hearing argument made an order on 18 January 1983 that the joinder of the third and fourth defendants was to take effect from 30 July 1982. The judge was not asked to reconsider the terms of amendment (d) or to alter it. But the effect of his order radically altered the effect of amendment (d) by providing that the terminus ad quem for limitation purposes moved back from October 1982 to 30 July 1982. It necessarily follows that the judge would not have allowed amendment (d) on 10 December 1982 if he had appreciated that its effect was to provide that the claims were statute-barred by the time that the defendants were joined in October 1982. If that had been his intention there would have been no point in making the order he did on 18 January 1983. When the judge exercised his discretion to allow the amendment on 10 December 1982 he clearly did not appreciate that it permitted or was intended to permit the third and fourth defendants to argue that the claims were statute-barred in any event by October 1982.

In these circumstances the Court of Appeal having held that the judge had no power to rectify the effect of the amendment by backdating the joinder to 30 July 1982 were free to substitute their own discretion for that of the judge, which had clearly been based on a misapprehension. The appellants in their written case concede that the Court of Appeal were free to exercise their own discretion but contend that in the circumstances of this case they were bound as a matter of law to exercise it in favour of allowing the amendment.

My Lords, assuming that the third and fourth defendants knew, or ought to have known, that they were not joined until October 1982 ample grounds exist to justify the refusal of the Court of Appeal to allow amendment (d). The only extra argument that the *Pirelli* decision made available for limitation purposes was that these claims were statute-barred if the terminus ad quem was the date of the original writ and that argument depends upon the view that the houses were "doomed from the start." This argument is available under amendments (a), (b) and (c).

If the defendants had wished to plead that these claims were time-barred in any event by October 1982 they should have pleaded it in their defence. It would have been a truly technical defence as they could hardly have claimed to be taken by surprise and therefore at a disadvantage as they had been parties to the proceedings in their capacity as third and fourth parties since April and August 1981 respectively.

In considering how they should exercise their discretion, the Court of Appeal were entitled to take into account the following among other factors, that these were personal plaintiffs, that the trial was nearly ended and the merits of the case had been fully investigated, that the defendants had in fact been parties to the litigation since August 1981, and that they had no one but themselves to blame for not pleading limitation in the original defence if they had wished to do so. Here were ample grounds upon which to exercise the discretion in favour of refusing amendment (d) and I agree with the decision of the Court of Appeal.

I have had the advantage of reading the speech of my noble and learned friend, Lord Keith of Kinkel, on the remaining issues in this appeal, namely "relation back," "date of joinder," and "doomed from the start." I agree with his reasoning and conclusions on each of these issues. However, as I agree with the Court of Appeal that amendment (d) should not have been allowed by the trial judge, it follows that I would dismiss this appeal.

Lord Goff of Chieveley. My Lords, I have had the opportunity of reading in draft the speeches of my noble and learned friends Lord Keith of Kinkel and Lord Griffiths. Like Lord Griffiths, I am in agreement with the opinion expressed by Lord Keith of Kinkel on the issues concerned with "relation back," "date of joinder," and "doomed from the start." I also agree with Lord Griffiths that, for the reasons given by him, there were ample grounds upon which the Court of Appeal could exercise their own discretion in favour of refusing amendment (d). I would therefore dismiss the appeal.

Appeal dismissed.
Architects to pay plaintiffs' and Mid-Sussex District Council's costs in House of Lords.

Solicitors: Hewitt, Woollacott & Chown.

C. T. B.

[HOUSE OF LORDS]

RAINEY . . . . . APPELLANT

AND

GREATER GLASGOW HEALTH BOARD RESPONDENTS

1986 Oct. 6, 7; Nov. 27

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Griffiths, Lord Mackay of Clashfern and Lord Goff of Chieveley

Discrimination, Sex—Equal pay—Variation due to material difference—Female prosthetist employed directly in National Health Service—Rate of pay lower than that offered to male prosthetists recruited from private contractors—Whether variation due to material difference other than sex—Equal Pay Act 1970 (c. 41), s. 1(3) (as amended by Sex Discrimination Act 1975 (c. 65), s. 8(1))

In 1979, the Secretary of State for Scotland decided to establish a prosthetic service within the Scottish National Health Service and to discontinue the existing arrangement whereby prosthetic services were provided by private contractors. Because it was thought that the remuneration of National Health Service employees, determined in the Whitley Councils for the Health Services (Great Britain), might not be sufficient to attract enough qualified prosthetists from the private sector, they were given the option of remaining on the rates of pay and conditions of service that they were then receiving, subject to future changes as negotiated by their trade union. It was, however, decided that, in general, the remuneration of employees in the new service should be related to the Whitley Council scale. Those previously employed by private contractors, who were all men, accepted the option. On 1 October 1980, the applicant, a woman, entered the employment of the National Health Service as a prosthetist directly, not having been previously employed by a private contractor. She accepted the Whitley Council rate of pay, which was substantially lower than that of a prosthetist, C., with broadly similar qualifications and experience, who had transferred from the private sector. The applicant applied to an industrial tribunal under the Equal Pay Act 1970[1] for a declaration against the health board that she was entitled to the same pay as C. The industrial tribunal, upholding the board's contention and dismissing the applicant's claim, held that the variation in pay between the applicant and C. was due to a material difference within section 1(3) of the Act (as amended) between her case and his in that C. had come from the private sector and was paid on a scale negotiated by his trade union whereas the applicant was paid on a different scale. The Employment Appeal Tribunal by a majority dismissed the applicant's appeal and the First Division of the Inner House of the Court of Session by a majority upheld the Employment Appeal Tribunal.

On appeal by the applicant:—

Held, dismissing the appeal, that "material" in section 1(3) of the Equal Pay Act 1970 meant "significant and relevant" and the difference had to be between the woman's case and the

[1] Equal Pay Act 1970, s. 1, as amended: see post, p. 232c–g.

man's; that all the relevant circumstances of a person's case were to be considered and they might go beyond the personal qualifications or merits of the individual by way of skill, experience and training; in particular, section 1(3) might apply where a difference in pay was reasonably necessary in order to obtain some result, other than cheap female labour, that the employer desired to achieve for economic reasons or for other reasons such as administrative efficiency in a concern not engaged in commerce or business; that there had been sound administrative reasons for placing prosthetists in general, both male and female, on the Whitley Council scale at the point selected, and, accordingly, the grounds founded on by the board as constituting a material difference between the applicant's case and that of C. had been capable in law of constituting a relevant difference for the purposes of section 1(3) of the Act of 1970 and, on the facts found by the industrial tribunal, had been objectively justified (post, pp. 235C–E, 237E–F, 238E–H, 239F—240A, F—241A).

Per curiam. (i) There is now no reason to construe section 1(3) as conferring greater rights on a worker in this context than does article 119 of the Treaty of Rome (post, pp. 238G, 240F—241A).

(ii) Section 1(1)(*b*) of the Sex Discrimination Act 1975, which has the effect of prohibiting indirect discrimination between men and women, does not, for present purposes, add anything to section 1(3) of the Act of 1970 since a difference that demonstrated unjustified indirect discrimination would not discharge the onus placed on the employer under section 1(3). Further, there would not appear to be any material distinction in principle between the need to demonstrate objectively justified grounds of difference for the purposes of section 1(3) and the need to justify a requirement or condition under section 1(1)(*b*)(ii) of the Act of 1975 (post, pp. 240D–E, F—241A).

Jenkins v. Kingsgate (Clothing Productions) Ltd. (Case 96/80) [1981] 1 W.L.R. 972, E.C.J.; [1981] 1 W.L.R. 1485, E.A.T. and *Bilka-Kaufhaus G.m.b.H. v. Weber von Hartz* (Case 170/84) [1987] I.C.R. 110, E.C.J. applied.

Dicta of Lord Denning M.R. and Lawton L.J. in *Clay Cross (Quarry Services) Ltd. v. Fletcher* [1978] 1 W.L.R. 1429, 1433, 1437, C.A. not applied.

Decision of the First Division of the Inner House of the Court of Session [1985] I.R.L.R. 414 affirmed.

The following cases are referred to in the opinion of Lord Keith of Kinkel:

Bilka-Kaufhaus G.m.b.H. v. Weber von Hartz (Case 170/84) [1987] I.C.R. 110, E.C.J.

Clay Cross (Quarry Services) Ltd. v. Fletcher [1978] 1 W.L.R. 1429; [1979] I.C.R. 1; [1979] 1 All E.R. 474, C.A.

Jenkins v. Kingsgate (Clothing Productions) Ltd. (Case 96/80) [1981] 1 W.L.R. 972; [1981] I.C.R. 592, E.C.J.; [1981] 1 W.L.R. 1485; [1981] I.C.R. 715, E.A.T.

Shields v. E. Coomes (Holdings) Ltd. [1978] 1 W.L.R. 1408; [1978] I.C.R. 1159; [1979] 1 All E.R. 456, C.A.

The following additional cases were cited in argument:

Clarke v. Eley (IMI) Kynoch Ltd. [1983] I.C.R. 165, E.A.T.

Corning Glass Works v. Brennan (1974) 417 U.S. 188

Farthing v. Ministry of Defence [1980] I.R.L.R. 402, C.A.

Garland v. British Rail Engineering Ltd. [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] I.C.R. 420; [1982] 2 All E.R. 402, H.L.(E.)

Griggs v. Duke Power Co. (1971) 401 U.S. 424

Hodgson v. Brookhaven General Hospital (1970) 436 F. 2d 719

Macarthys Ltd. v. Smith (Case 129/79) [1981] Q.B. 180; [1980] 3 W.L.R. 929; [1980] I.C.R. 672; [1981] 1 All E.R. 111, E.C.J.

Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548; [1983] 2 W.L.R. 620; [1983] I.C.R. 385; [1983] 1 All E.R. 1062, H.L.(E.)

Reg. v. Shivpuri [1987] A.C. 1; [1986] 2 W.L.R. 988; [1986] 2 All E.R. 334, H.L.(E.)

Snoxell v. Vauxhall Motors Ltd. [1978] Q.B. 11; [1977] 3 W.L.R. 189; [1977] I.C.R. 700; [1977] 3 All E.R. 770, E.A.T.

Appeal from the First Division of the Inner House of the Court of Session.

This was an appeal by the applicant, Mrs. Elizabeth Anne Rainey, from an interlocutor of the First Division of the Inner House of the Court of Session (Lord President Lord Emslie and Lord Cameron, Lord Grieve dissenting) [1985] I.R.L.R. 414 dated 3 July 1985 by a majority dismissing her appeal from the judgment of the Employment Appeal Tribunal (Lord McDonald, Mr. W. Barrie Abbott and Mr. J. S. Bell) [1984] I.R.L.R. 88 given on 26 October 1983. The tribunal by a majority dismissed the applicant's appeal from an industrial tribunal, which had dismissed her application under the Equal Pay Act 1970 for a declaration.

The facts are set out in the opinion of Lord Keith of Kinkel.

Anthony Lester Q.C. and *David Pannick* for the applicant. The issues in this appeal are: (1) whether the variation in the pay of the applicant and the comparable man employed on like work in the same employment is, pursuant to section 1(3) of the Equal Pay Act 1970 (as amended), "genuinely due to a material difference (other than the difference of sex) between her case and his" when that difference is based on the circumstances in which the applicant and the man entered into the employment and has nothing to do with the personal skills, qualifications, experience or other personal attributes of the applicant and the comparable man; (2) whether that variation in pay can satisfy section 1(3) when the relevant pay policy of the respondents indirectly discriminates against women in that it has a considerable disparate impact on women (compared with men), to the detriment of the applicant, and when that pay policy is, as found by the industrial tribunal, "unfair and unreasonable." The House has not previously considered such issues.

On the first issue, all three members of the Court of Session accepted as correct the interpretation of section 1(3) of the Act of 1970 adopted by the Court of Appeal in *Clay Cross (Quarry Services) Ltd. v. Fletcher* [1978] 1 W.L.R. 1429; [1979] I.C.R. 1, namely: (1) an employer does not necessarily satisfy section 1(3) merely because he proves that the woman employee receives less pay than the male employee for a reason extraneous to her sex. (2) To satisfy section 1(3), an employer needs to prove that the difference in pay is due to a difference in the "personal

A equation" of the woman employee and the male employee, that is, something in their personal circumstances, such as their respective skill, experience or training. (3) An employer cannot satisfy this test where the only difference to which he can point is one based on the circumstances in which the woman employee and the male employee came to be employed, in particular if those circumstances amount to the fact that the employer needed to pay the man more in order to persuade B him to work for that employer.

These principles are correct, for the reasons given by the Court of Appeal in *Clay Cross:* (1) section 1(3) refers to a "material" difference "between her case and his." Parliament could have said, but did not say, that there was no breach of the Act of 1970 where an employer proved that the less favourable treatment was not on the ground of sex. (2) In C the absence of such an interpretation, the objectives of the Act would be frustrated. (3) This test is consistent with Community law, that is, article 119 of the Treaty of Rome and Directive 75/117.

The applicant further relies on the fact that Parliament, in enacting the Equal Pay (Amendment) Regulations 1983 (S.I. 1983 No. 1794), has not amended the language of section 1(3) in any material respect in like work cases and has drawn a distinction between the scope of the section D 1(3) defence in "like work" cases and the scope of that defence in "equal value" cases. That distinction reflects legislative approval of *Clay Cross* in "like work" cases, such as the present.

For the reasons given in the dissenting judgment of Lord Grieve in the Court of Session (and in the dissenting judgment of Mr. J. S. Bell in the Employment Appeal Tribunal), the application of these principles E means that the respondents have failed to satisfy section 1(3) in the present case: (1) there is no difference in the personal circumstances of the applicant and Mr. Crumlin. (2) The only difference is in the circumstances in which they came to be employed. (3) Those circumstances amounted to a recognition by the respondents that, in order to attract Mr. Crumlin (and other prosthetists in private practice) into the N.H.S., they would need to be paid a salary not less favourable F than the salary that they were earning in private practice. (4) The respondents did not need to pay the applicant the same salary as Mr. Crumlin (and other prosthetists recruited from private practice) in order to attract her into the job. There was no reason other than these market forces for failing to give the applicant the same contractual terms as Mr. Crumlin (and other prosthetists recruited from private practice).

G The Court of Appeal's decision in *Farthing v. Ministry of Defence* [1980] I.R.L.R. 402 (relied on by the Lord President and Lord Cameron) does not assist the respondents in establishing a section 1(3) defence since: (1) in *Farthing,* the Court of Appeal analysed the difference in pay as due to "red-circling" of certain existing employees, that is, where the pay of a group of employees was protected for reasons personal to them. Certainly "red-circling" can apply to a case where employees are H transferred from one job to another with the same employer. That is, however, very different from the present case where the special pay provisions arise by reason of recruitment from outside the employment. *Clay Cross* correctly draws a line between red-circling within the same

employment and cases, such as the present, where an employer pays a man more in order to attract him into the job. (2) The Court of Appeal saw *Farthing* as a special case where a problem arose by reason of the employer's bona fide attempts to secure equal pay for men and women prior to 1975. No such issue arises in the present case. (3) *Farthing* did not concern market forces.

For the above reasons, the industrial tribunal erred in law in concluding that the respondents satisfied the criteria of section 1(3) of the Act of 1970 where the difference relied on was based on the circumstances in which the applicant and Mr. Crumlin had come to be employed. [Reference was made to *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] I.C.R. 592, *per* Advocate General Warner; *Hodgson v. Brookhaven General Hospital* (1970) 436 F. 2d 719; *Corning Glass Works v. Brennan* (1974) 417 U.S. 188; and *Reg. v. Shivpuri* [1987] A.C. 1, 17E (Lord Bridge of Harwich).] On the application of *Clay Cross* to the facts of the present case, see *Snoxell v. Vauxhall Motors Ltd.* [1978] Q.B. 11, 22B–D; [1977] I.C.R. 700, 711B–D. The present case has nothing to do with protecting existing employees.

On the language of the Act, all its words must be construed and given meaning. "Genuinely" was included to deal with pretexts.

On the second issue, the Court of Session rejected the applicant's argument on the ground that no "requirement or condition" was applied to her.

The difference relied on by the respondents for the purposes of section 1(3) of the Act of 1970 is "the difference of sex" if it discriminates directly or indirectly against women. Indirect discrimination means the application of a policy or practice that satisfies section 1(1)(*b*) of the Act of 1975, that is, that it is a requirement or condition having a considerable disparate impact on women, being to the detriment of the applicant because she cannot comply with it, and which the respondents cannot show to be justifiable.

Section 1(3) of the Act of 1970 covers indirect discrimination for the following main reasons: (1) the Acts of 1970 and 1975 are part of a code prohibiting sex discrimination in employment. Therefore, the provisions of the two statutes should be construed consistently, so far as possible: see *Shields v. E. Coomes (Holdings) Ltd.* [1978] 1 W.L.R. 1408, 1422C–D (Orr. L.J.), 1425H, 1426A (Bridge L.J.); [1978] I.C.R. 1159, 1174E–F, 1178D–F. (2) The Act of 1970 has been so interpreted by the Employment Appeal Tribunal: *Jenkins v. Kingsgate (Clothing Productions) Ltd. (Case 96/80)* [1981] 1 W.L.R. 1485; [1981] I.C.R. 715. (3) Such an interpretation of the Act is consistent with Community law: *Jenkins v. Kingsgate (Clothing Productions) Ltd. (Case 96/80)* [1981] 1 W.L.R. 972; [1981] I.C.R. 592 (European Court of Justice). (4) This interpretation is suggested by section 2A(2) and (3) of the Act as amended by the Regulations of 1983.

In the circumstances of the present case, the difference relied on by the respondents under section 1(3) is "the difference of sex" in that it indirectly discriminates against women: (1) there is a requirement or condition, or a policy or practice, imposed by the respondents: to qualify for the higher pay as a prosthetist one must be one of those

recruited from private practice in 1980. The Employment Appeal Tribunal stated in *Clarke v. Eley (IMI) Kynoch Ltd.* [1983] I.C.R. 165, 172 that the words "requirement or condition" should be given a purposive construction consistent with the legislative aim of eliminating practices that have disproportionate impact on women. (2) The requirement or condition here has a considerable disparate impact on women. All those prosthetists on the high pay levels are men. Almost all those prosthetists on the lower pay levels are women: see *Mandla (Sewa Singh) v. Dowell Lee*]1983] 2 A.C. 548, 565–566; [1983] I.C.R. 385, 393–394. (3) The requirement or condition has not been shown by the respondents to be justifiable. On the contrary, the industrial tribunal found that the present difference of pay was "unfair and unreasonable": see *Mandla,* at pp. 556–567; 394–395. (4) The requirement or condition is to the detriment of the applicant because she cannot comply with it. [Reference was made to *Griggs v. Duke Power Co.* (1971) 401 U.S. 424; *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751; *Bilka-Kaufhaus G.m.b.H. v. Weber von Hartz (Case 170/84)* [1987] I.C.R. 110, 126; *Pannick, Sex Discrimination Law* (1985), pp. 92, 105 et seq.; Christopher McCrudden, "Equal Pay for Work of Equal Value: the Equal Pay (Amendment) Regulations 1983" (1983) 12 Industrial Law Journal, p. 197. The judgment of the Employment Appeal Tribunal (Browne-Wilkinson J.) in *Jenkins v. Kingsgate (Clothing Productions) Ltd. (Case 96/80)* was correct; the applicant adopts it as part of her argument. If the language of section 1(3) is ambiguous, the applicant's interpretation of it is consistent with article 119 of the Treaty of Rome: see *Bilka-Kaufhaus G.m.b.H. v. Weber von Hartz* [1987] I.C.R. 110, 126. Section 1(3) is concerned with discrimination *now* being applied, not with something that happened in the past. [Reference was made to *Clarke v. Eley (IMI) Kynoch Ltd.,* [1983] I.C.R. 165, 171B–D.]

W. A. Nimmo Smith Q.C. and *Ann Paton* (both of the Scottish Bar) for the respondents, the Greater Glasgow Health Board. The decisions of the industrial tribunal, the majority of the Employment Appeal Tribunal and the majority of the First Division were sound in law. (a) On a proper construction of section 1(3) of the Act of 1970, an employee is entitled to a decision in his favour only where the employer has failed to prove that the variation between the man's contract and the woman's contract was genuinely due to a material difference other than the difference of sex between her case and his; the applicant is incorrect in submitting that section 1(3) can be applied without, or without some emphasis being placed on, the words in parenthesis, viz. "(other than the difference of sex)." (b) In assessing the difference between the man's case and the woman's, a tribunal may be entitled to have regard to factors such as method of entry or intake; the language of the Act itself is paramount, and definitions and phrases such as "personal equations," "market forces" and "red-circling" and cases such as *Clay Cross (Quarry Services) Ltd. v. Fletcher* [1979] I.C.R. 1 and *Farthing v. Ministry of Defence* [1980] I.R.L.R. 402 are illustrative but not necessarily conclusive in every case. (c) On the evidence available, the industrial tribunal, the majority of the Employment Appeal Tribunal and the majority of the First Division were entitled, when comparing the

applicant's case with Mr. Crumlin's, to accept as a "material difference (other than the difference of sex)" the highly special circumstances occurring when the public sector N.H.S. prosthetic service was set up in 1980 in what had until then been a private sector field of employment, resulting in the necessity of securing the services of the private practitioners for the new N.H.S. prosthetic service with protection for their rates of pay. The applicant is wrong in submitting that those special circumstances were extrinsic circumstances to which no regard should be paid. The terms of appointment applicable to practitioners transferring from private practice to the N.H.S. in the special circumstances in 1980 did not discriminate between men and women; neither did the terms of appointment applicable to newly qualified practitioners entering the N.H.S. without previous experience in private practice and to private practitioners transferring to the N.H.S. after 1980. (d) The dissenting opinion of Lord Grieve failed adequately to take into account the fact that it is the Scottish Home and Health Department, and not the respondents, who determine the scale of remuneration for N.H.S. employees in terms of the National Health Service (Remuneration and Conditions of Service) (Scotland) Regulations 1974 (S.I. 1974 No. 276 (s.18)) and, further, the fact that the applicant became established in one nationally negotiated scale whereas the male comparator, Mr. Crumlin, became established in a quite different nationally negotiated scale. (e) No relevant requirement or condition of the kind contended for on behalf of the applicant was applied by them to her, so that section 1(1)(*b*) of the Act of 1975 is inapplicable, and there is nothing that the respondents require to prove to be justifiable in terms thereof. [Reference was made to *Jenkins v. Kingsgate (Clothing Productions) Ltd. (Case 96/80)* [1981] 1 W.L.R. 972; [1981] I.C.R. 592, 599; *Snoxell v. Vauxhall Motors Ltd.* [1978] Q.B. 11, 22E et seq.; [1977] I.C.R. 700, 711E et seq.; *Bilka-Kaufhaus G.m.b.H. v. Weber von Hartz (Case 170/84)* [1980] I.C.R. 110 (regarding materiality); and *Macarthys Ltd. v. Smith (Case 129/79)* [1981] Q.B. 180, 198; [1980] I.C.R. 672, 690.]

"Material" in section 1(3) does no more than emphasise that the burden of proof is on the employer. "Requirement or condition" in section 1(1)(*b*) must be something that can be complied with *at the time.*

Lester Q.C. in reply. The Act of 1970 does not guarantee equal pay: it guarantees equal contractual terms.

Their Lordships took time for consideration.

27 November. Lord Keith of Kinkel. My Lords, this appeal from an interlocutor of the First Division of the Inner House, which affirmed the decisions of an industrial tribunal and of the Employment Appeal Tribunal, is concerned with the proper construction of certain provisions of the Equal Pay Act 1970.

The appellant, a woman, has since 1 October 1980 been employed by the respondent board at the Belvidere Hospital, Glasgow, as a prosthetist. A prosthetist is one who is concerned with the fitting of artificial limbs. Before 1980 no prosthetist was directly employed by any

A health authority in Scotland. The requisite services were provided by private contractors themselves employing qualified prosthetists who worked in a number of hospitals, including Belvidere Hospital. One of these was a Mr. Alan Crumlin. In 1979 the Secretary of State for Scotland decided to establish a prosthetic fitting service within the National Health Service in Scotland, and to discontinue the arrangement under which the service was provided by private contractors. To achieve B this object it was necessary that a sufficient number of qualified prosthetists should be recruited to the National Health Service en bloc. The only prosthetists then available were those employed by the private contractors. The remuneration of employees of the National Health Service is determined by negotiation and agreement in the Whitley Councils for the Health Services (Great Britain). It was decided by the C Scottish Home and Health Department that, in general, the remuneration of employees in the new prosthetic service should be related to the Whitley Council scale, and that the appropriate scale for them would be that for medical physics technicians. Since, however, it was appreciated this might not be attractive to the prosthetists in the employment of private contractors, whom it was desired to recruit en bloc, it was decided to offer them an option. That option, as set out in a letter from D the department to Mr. Crumlin dated 11 January 1980, was either to come into the National Health Service on National Health Service rates of pay and conditions of service or to remain on the rates of pay and the conditions of service which he presently received, subject to future changes as negotiated by his trade union, the Association of Scientific, Technical and Managerial Staffs ("A.S.T.M.S."), for the prosthetists E employed by contractors. It is to be observed that in England prosthetic services were to continue to be provided through private contractors. Mr. Crumlin and all the other prosthetists who received the offer (about 20 in number who all happened to be men) opted for the second alternative. This meant that they retained their existing salaries, and that future increases were to be negotiated with A.S.T.M.S. and not the Whitley Council. Mr. Crumlin commenced employment with the National F Health Service at Belvidere Hospital in July 1980 at the salary of £6,680 per annum, the same as he had been receiving from his former employer. At the time of the hearing before the industrial tribunal, on 23 March 1983, it had increased to £10,085 per annum.

The appellant entered the employment of the National Health Service as a prosthetist working at Belvidere Hospital on 1 October 1980. She G did so directly, not having been previously employed by a private contractor. Her qualifications and experience were broadly similar to those of Mr. Crumlin. The rates of pay and conditions of service offered to and accepted by her corresponded to those of a medical physics technician at the appropriate point on the Whitley Council scale. Her starting salary was £4,773, and at the time of the hearing before the industrial tribunal it had increased to £7,295. A male prosthetist, H Mr. Davey, was engaged at the same time and on the same conditions. He has since left his employment.

No prosthetists have since 1980 transferred from private employment to National Health Service employment, and no such transfers on special

terms will be permitted in the future. Any prosthetists engaged by the respondents in the future, whether male or female, will do so on the National Health Service scale of remuneration. No arrangements have been made for phasing out the disparity between the prosthetists who transferred from the private sector in 1980, such as Mr. Crumlin, and those who entered the National Health Service employment directly, such as the appellant.

In these circumstances, the appellant applied to an industrial tribunal, under the Act of 1970, for a declaration that she was entitled to the same pay as Mr. Crumlin.

The appellant founded upon section 1(1) and (2)(*a*) of the Act of 1970 which provide (as substituted by section 8(1) of and Schedule 1 to the Sex Discrimination Act 1975):

> "(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one. (2) . . . (*a*) where the woman is employed on like work with a man in the same employment— (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term; . . ."

The board did not dispute that the appellant was employed on like work with Mr. Crumlin, nor that the term of her contract as regards remuneration was less favourable than the corresponding term of Mr. Crumlin's contract. They founded on section 1(3) of the Act and undertook the burden of satisfying its provisions, which at the material time were in these terms:

> "An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his."

The industrial tribunal dismissed the appellant's application. Having narrated the facts of the case as found by them and the contentions of the parties they stated:

> "Having considered the evidence the tribunal is satisfied that what has caused the difference in the salary scale of the applicant and Mr. Crumlin is not market forces but is the fact that Mr. Crumlin is paid on a scale negotiated and agreed between his trade union and the Scottish Home and Health Department whereas the applicant is paid according to a different scale. The scale upon which the applicant is paid is an ad hoc scale and not one which has been

negotiated between her trade union and the Scottish Home and Health Department. There was clear evidence that any male employees recruited at the same time as or after the recruitment of the applicant would be paid the same rate as the applicant was and subject to the same scale. We had no doubt on the evidence that had any of the prosthetists employed by the private contractors been female they would have been paid the same higher rate of pay as the male prosthetists transferred from the private contractors. The tribunal were therefore forced to the conclusion that the difference had nothing to do with the fact that the applicant was female. We were satisfied that the reason for the difference was because of the different method of entry and had nothing to do with sex. The application must therefore be dismissed."

The appellant appealed to the Employment Appeal Tribunal which, by a majority, dismissed the appeal. A further appeal to the Court of Session was also dismissed by the First Division of the Inner House (Lord President Lord Emslie and Lord Cameron, Lord Grieve dissenting).

The facts found by the industrial tribunal make it clear that the Secretary of State for Scotland decided, as a matter of general policy, that the Whitley Council scale of remuneration and negotiating machinery, which applied throughout the National Health Service in Scotland, was appropriate for employees in the prosthetic service. It was also decided that the appropriate part of the scale for such employees was that applicable to medical physics technicians, presumably because the nature of their work was considered comparable to that of the prosthetists. So all direct entrants to the service, whether male or female, were to be placed on that part of the scale and made subject to Whitley Council negotiations. But it was apparent that the new service would not get off the ground unless a sufficient number of the prosthetists in the employment of the private contractors could be attracted into it. So the further policy decision was taken to offer these prosthetists the option of entering the service at their existing salaries and subject to the A.S.T.M.S. negotiating machinery. As it happened, all the prosthetists privately employed were male. In the result, Mr. Crumlin had the benefit of the offer and so emerged with a higher salary and better prospects for an increase than did the appellant, who did not have that benefit.

The main question at issue in the appeal is whether those circumstances are capable in law of constituting, within the meaning of section 1(3) of the Act of 1970, "a material difference (other than the difference of sex) between her case and his."

Counsel for the appellant argued that nothing can constitute such a difference which is not related to the personal circumstances of the two employees, such as their respective skills, experience or training. Reliance was placed upon the decision of the Court of Appeal in *Clay Cross (Quarry Services) Ltd. v. Fletcher* [1978] 1 W.L.R. 1429. In that case a woman sales clerk was employed at a lower wage than a male sales clerk who had been engaged at a later date. The employers relied,

as being the material difference between her case and his, on the circumstance that the male clerk had been the only suitable applicant for the post and that he had refused to accept it unless he was paid the same wage as he had received in his previous job. The Employment Appeal Tribunal had accepted this as discharging the onus on the employers under section 1(3) of the Act of 1970, but their decision was reversed by the Court of Appeal. Lord Denning M.R. said, at p. 1433:

> "The issue depends on whether there is a material difference (other than sex) between her case and his. Take heed to the words 'between her case and his.' They show that the tribunal is to have regard to *her* and to *him*—to the personal equation of the woman as compared to that of the man—irrespective of any extrinsic forces which led to the variation in pay. As I said in *Shields v. E. Coomes (Holdings) Ltd.* [1978] 1 W.L.R. 1408, 1418E, section 1(3) applies when 'the personal equation of the man is such that he deserves to be paid at a higher rate than the woman.' Thus the personal equation of the man may warrant a wage differential if he has much longer length of service, or has superior skill or qualifications; or gives bigger output or productivity; or has been placed, owing to downgrading, in a protected pay category, vividly described as 'red-circled'; or to other circumstances personal to him in doing his job. But the tribunal is not to have regard to any extrinsic forces which have led to the man being paid more. An employer cannot avoid his obligations under the Act by saying: 'I paid him more because he asked for more,' or 'I paid her less because she was willing to come for less.' If any such excuse were permitted, the Act would be a dead letter. Those are the very reasons why there was unequal pay before the statute. They are the very circumstances in which the statute was intended to operate. Nor can the employer avoid his obligations by giving the reasons why he submitted to the extrinsic forces. As for instance by saying: 'He asked for that sum because it was what he was getting in his previous job,' or, 'He was the only applicant for the job, so I had no option.' In such cases the employer may beat his breast, and say: 'I did not pay him more because he was a man. I paid it because he was the only suitable person who applied for the job. Man or woman made no difference to me.' Those are reasons personal to the employer. If any such reasons were permitted as an excuse, the door would be wide open. Every employer who wished to avoid the statute would walk straight through it."

Lawton L.J. said, at p. 1437:

> "What does section 1(3) in its context in both the Equal Pay Act 1970 and the Sex Discrimination Act 1975 mean? The context is important. The overall object of both Acts is to ensure that women are treated no less favourably than men. If a woman is treated less favourably than a man there is a presumption of discrimination which can only be rebutted in the sphere of employment if the employer brings himself within section 1(3). He cannot do so merely by proving that he did not intend to discriminate. There are more

ways of discriminating against women than by deliberately setting out to do so: see section 1(1)(*b*) of the Sex Discrimination Act 1975. If lack of intention had provided a lawful excuse for variation, section 1(3) would surely have been worded differently. The variation must have been genuinely due to (that is, caused by) a material difference (that is, one which was relevant and real) between—and now come the important words—her case and his. What is her case? And what is his? In my judgment, her case embraces what appertains to her *in* her job, such as the qualifications she brought to it, the length of time she has been in it, the skill she has acquired, the responsibilities she has undertaken and where and under what conditions she has to do it. It is on this kind of basis that her case is to be compared with that of the man's. What does not appertain to her job or to his are the circumstances in which they came to be employed. These are collateral to the jobs as such."

In my opinion these statements are unduly restrictive of the proper interpretation of section 1(3). The difference must be "material," which I would construe as meaning "significant and relevant," and it must be between "her case and his." Consideration of a person's case must necessarily involve consideration of all the circumstances of that case. These may well go beyond what is not very happily described as "the personal equation," i.e. the personal qualities by way of skill, experience or training which the individual brings to the job. Some circumstances may on examination prove to be not significant or not relevant, but others may do so, though not relating to the personal qualities of the employee. In particular, where there is no question of intentional sex discrimination whether direct or indirect (and there is none here) a difference which is connected with economic factors affecting the efficient carrying on of the employer's business or other activity may well be relevant.

This view is supported by two decisions of the European Court of Justice upon the interpretation of article 119 of the Treaty of Rome, requiring the application "of the principle that men and women should receive equal pay for equal work," and to the implementation of which the Equal Pay Act 1970 is directed. The first of these decisions is *Jenkins v. Kingsgate (Clothing Productions) Ltd.* (Case 96/80) [1981] 1 W.L.R. 972, which originated in the Employment Appeal Tribunal in England. A company employed full-time and part-time workers on like work, but paid the latter, almost all of whom were female, less than the former, who were predominantly male. The company claimed that it did so in order to encourage full-time work and hence achieve fuller utilisation of machinery, and this was accepted by an industrial tribunal as discharging the onus under section 1(3). The Employment Appeal Tribunal referred to the European Court questions directed to ascertaining whether the employers' policy constituted a contravention of article 119. The court's answer was, at pp. 982–983:

"9. It appears from the first three questions and the reasons stated in the order making the reference that the national court is

principally concerned to know whether a difference in the level of pay for work carried out part-time and the same work carried out full-time may amount to discrimination of a kind prohibited by article 119 of the Treaty when the category of part-time workers is exclusively or predominantly comprised of women. 10. The answer to the questions thus understood is that the purpose of article 119 is to ensure the application of the principle of equal pay for men and women for the same work. The differences in pay prohibited by that provision are therefore exclusively those based on the difference of the sex of the workers. Consequently the fact that part-time work is paid at an hourly rate lower than pay for full-time work does not amount per se to discrimination prohibited by article 119 provided that the hourly rates are applied to workers belonging to either category without distinction based on sex. 11. If there is no such distinction, therefore, the fact that work paid at time rates is remunerated at an hourly rate which varies according to the number of hours worked per week does not offend against the principle of equal pay laid down in article 119 of the Treaty in so far as the difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex. 12. Such may be the case, in particular, when by giving hourly rates of pay which are lower for part-time work than those for full-time work the employer is endeavouring, on economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker. 13. By contrast, if it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to article 119 of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex. 14. Where the hourly rate of pay differs according to whether the work is part-time or full-time it is for the national courts to decide in each individual case whether, regard being had to the facts of the case, its history and the employer's intention, a pay policy such as that which is at issue in the main proceedings although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker. 15. The reply to the first three questions must therefore be that a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by article 119 of the Treaty unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women."

A B C D E F G H

The formal ruling of the court was, at p. 984:

A "1. A difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by article 119 of the Treaty unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women. 2. Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national B measures, to establish that the payment of lower hourly rates of remuneration for part-time work than for full-time work represents discrimination based on difference of sex the provisions of article 119 of the Treaty apply directly to such a situation."

When the case was again before the Employment Appeal Tribunal [1981] 1 W.L.R. 1485, 1492, Browne-Wilkinson J., delivering judgment, C accepted that the ruling of the European Court established that a differential in pay between part-time workers, who are predominantly women, and full-time male workers can be justified as being a material difference by showing that the pay differential does in fact achieve economic advantages for the employer. He found difficulty, however, in elucidating whether the judgment and ruling of the European Court D meant that it was sufficient for the employer to show that he had no intention of discriminating because his pay practice was directed to some legitimate economic objective, or that he must show that the practice was in fact reasonably necessary in order to achieve that objective. In the result, he took the view that if article 119 as construed by the European Court was satisfied if the employer met the less demanding criterion, nevertheless section 1(3) of the Act of 1970 went further than E that and required the employer to meet the more demanding one. This view is encapsulated in this passage, at p. 1495:

"(4) If the industrial tribunal finds that the employer intended to discriminate against women by paying part-time workers less, the employer cannot succeed under section 1(3). (5) Even if the employer had no such intention, for section 1(3) to apply the F employer must show that the difference in pay between full-time and part-time workers is reasonably necessary in order to obtain some result (other than cheap female labour) which the employer desires for economic or other reasons."

In the result, the case was remitted to the industrial tribunal to find whether the lower rate of pay for part-time workers was in fact G reasonably necessary in order to enable the employers to reduce absenteeism and to obtain the maximum utilisation of their plant.

The European Court had occasion to consider the question afresh in *Bilka-Kaufhaus G.m.b.H. v. Weber von Hartz* (Case 170/84) [1987] I.C.R. 110. A German department store operated an occupational pension scheme for its employees, under which part-time employees were eligible for pensions only if they had worked full-time for at least H 15 years over a total period of 20 years. That provision affected disproportionately more women than men. A female part-time employee claimed that the provision contravened article 119 of the Treaty. The employers contended that it was based upon objectively justified

economic grounds, in that it encouraged full-time work which resulted in lower ancillary costs and the utilisation of staff throughout opening hours. The European Court by its decision made it clear that it was not sufficient for the employers merely to show absence of any intention to discriminate, saying, at p. 126:

> "It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds. If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of article 119. The answer to question 2(a) must therefore be that under article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end."

It therefore appears that the European Court has resolved the doubts expressed by Browne-Wilkinson J. in *Jenkins v. Kingsgate (Clothing Productions) Ltd.* (Case 96/80) [1981] 1 W.L.R. 1485 and established that the true meaning and effect of article 119 in this particular context is the same as that there attributed to section 1(3) of the Act of 1970 by the Employment Appeal Tribunal. Although the European Court at one point refers to "economic" grounds objectively justified, whereas Browne-Wilkinson J. speaks of "economic or other reasons," I consider that read as a whole the ruling of the European Court would not exclude objectively justified grounds which are other than economic, such as administrative efficiency in a concern not engaged in commerce or business.

The decision of the European Court on article 119 must be accepted as authoritative and the judgment of the Employment Appeal Tribunal on section 1(3) of the Act of 1970, which in my opinion is correct, is in harmony with it. There is now no reason to construe section 1(3) as conferring greater rights on a worker in this context than does article 119 of the Treaty. It follows that a relevant difference for purposes of section 1(3) may relate to circumstances other than the personal qualifications or merits of the male and female workers who are the subject of comparison.

In the present case the difference between the case of the appellant and that of Mr. Crumlin is that the former is a person who entered the National Health Service at Belvidere Hospital directly while the latter is a person who entered it from employment with a private contractor. The

fact that one is a woman and the other a man is an accident. The findings of the industrial tribunal make it clear that the new prosthetic service could never have been established within a reasonable time if Mr. Crumlin and others like him had not been offered a scale of remuneration no less favourable than that which they were then enjoying. That was undoubtedly a good and objectively justified ground for offering him that scale of remuneration. But it was argued for the appellant that it did not constitute a good and objectively justified reason for paying the appellant and other direct entrants a lower scale of remuneration. This aspect does not appear to have been specifically considered by either of the tribunals or by their Lordships of the First Division, apart from Lord Grieve who said [1985] I.R.L.R. 414, 425:

> "I accept that the facts which provided the evidence before both tribunals were sufficient to explain why Mr. Crumlin (and his colleagues) were paid on a scale equivalent to that which they had been receiving while employed in the private sector, but in my opinion that evidence is not sufficient to explain why, when the National [Health] Service door was opened to the appellant (and other prosthetists not previously employed in the private sector) the appellant (and her fellow prosthetists) were paid on a lower scale. In the absence of a reasonable explanation as to why the appellant was paid on a lower scale than Mr. Crumlin I am of opinion that the respondents have not discharged the onus placed upon them by section 1(3) of the Act of 1970, and that the majority of the Employment Appeal Tribunal were not entitled on the facts before them to conclude that they had."

The position in 1980 was that all National Health Service employees were paid on the Whitley Council scale, and that the Whitley Council negotiating machinery applied to them. The prosthetic service was intended to be a branch of the National Health Service. It is therefore easy to see that from the administrative point of view it would have been highly anomalous and inconvenient if prosthetists alone, over the whole tract of future time for which the prosthetic service would endure, were to have been subject to a different salary scale and different negotiating machinery. It is significant that a large part of the difference which has opened up between the appellant's salary and Mr. Crumlin's is due to the different negotiating machinery. Accordingly, there were sound objectively justified administrative reasons, in my view, for placing prosthetists in general, men and women alike, on the Whitley Council scale and subjecting them to its negotiating machinery. There is no suggestion that it was unreasonable to place them on the particular point on the Whitley Council scale which was in fact selected, ascertained by reference to the position of medical physics technicians and entirely regardless of sex. It is in any event the fact that the general scale of remuneration for prosthetists was laid down accordingly by the Secretary of State. It was not a question of the appellant being paid less than the norm but of Mr. Crumlin being paid more. He was paid more because of the necessity to attract him and other privately employed prosthetists into forming the nucleus of the new service.

I am therefore of the opinion that the grounds founded on by the board as constituting the material difference between the appellant's case and that of Mr. Crumlin were capable in law of constituting a relevant difference for purposes of section 1(3) of the Act of 1970, and that on the facts found by the industrial tribunal they were objectively justified.

Counsel for the appellant put forward an argument based on section 1(1)(*b*) of the Sex Discrimination Act 1975 (with which the Act of 1970 is to be read as one: *Shields v. E. Coomes (Holdings) Ltd.* [1978] 1 W.L.R. 1408, 1416), which is in these terms:

> "(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—. . . (*b*) he applies to her a requirement or condition which he applies or would apply equally to a man but—(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (iii) which is to her detriment because she cannot comply with it."

This provision has the effect of prohibiting indirect discrimination between women and men. In my opinion it does not, for present purposes, add anything to section 1(3) of the Act of 1970, since, upon the view which I have taken as to the proper construction of the latter, a difference which demonstrated unjustified indirect discrimination would not discharge the onus placed on the employer. Further, there would not appear to be any material distinction in principle between the need to demonstrate objectively justified grounds of difference for purposes of section 1(3) and the need to justify a requirement or condition under section 1(1)(*b*)(ii) of the Act of 1975. It is therefore unnecessary to consider the argument further.

My Lords, for these reasons I would dismiss the appeal with costs.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Lord Griffiths. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Lord Goff of Chieveley. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend,

Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Denise Kingsmill & Co., Kew; Lawrence Graham for John R. Griffiths W.S., Edinburgh.

M. G.

[HOUSE OF LORDS]

SMITH AND OTHERS . . . . . APPELLANTS

AND

LITTLEWOODS ORGANISATION LTD. . . . RESPONDENTS

MALOCO . . . . . APPELLANT

AND

LITTLEWOODS ORGANISATION LTD. . . . RESPONDENTS

[CONSOLIDATED APPEALS]

1986 Oct. 13, 14;
1987 Feb. 5

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Griffiths, Lord Mackay of Clashfern and Lord Goff of Chieveley

Negligence—Duty of care to whom?—Occupiers of adjoining premises—Disused cinema building—Fire started in building by vandals—Neighbouring properties damaged—Duty of care of cinema owners

The defenders in 1976 purchased a cinema building with the intention of demolishing it and replacing it by a supermarket. After their contractors had done some work in June, the cinema remained empty and unattended. The security of the building was from time to time overcome by children and young persons, and vandalism took place in and around it, including an attempt to set fire to some old film in an adjoining close and an attempt to light a fire in the cinema itself. On 5 July 1976 a fire was deliberately started in the cinema by children or teenagers, as a result of which the cinema burned down and an adjacent café and billiard saloon and a nearby church belonging to the pursuers were seriously damaged. The pursuers brought actions against the defenders for damages claiming that the damage to

their properties had been caused by the defenders' negligence. The Lord Ordinary held that the lighting of a fire in the cinema premises by children or teenagers had in the circumstances been reasonably foreseeable and gave judgment for the pursuers. On the defenders' motions for review of the Lord Ordinary's interlocutors, the pursuers accepted that, on the evidence, the defenders had had no knowledge of the previous attempts to start fires. The First Division of the Inner House of the Court of Session allowed the defenders' motions.

On appeals by the pursuers:—

Held, dismissing the appeals, that whether an occupier of property owed a duty of care to adjoining occupiers in respect of acts of trespass on his property resulting in damage to the adjoining properties depended on all the circumstances of the case and on socially accepted standards of behaviour; that cases in which such a duty would exist were likely to be rare; and that, since the defenders had not known of the previous acts of vandalism in their cinema involving fire and since the cinema had not otherwise presented an obvious fire risk, the defenders had not been under any duty to the pursuers to anticipate the possibility of the cinema being set on fire by vandals by keeping the premises lockfast or otherwise taking steps to prevent their entry (post, pp. 249F–H, 250B–G, 251B–F, 255E–G, 258E–F, 259C–D, 261F–G, 270B–C, 272H—273A, 274A–D, 275G—276A).

Dictum of Lord Radcliffe in *Bolton v. Stone* [1951] A.C. 850, 868–869, H.L.(E.) and *Goldman v. Hargrave* [1967] 1 A.C. 645, P.C. applied.

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C 1004, H.L.(E.); *Thomas Graham & Co. Ltd. v. Church of Scotland General Trustees,* 1982 S.L.T. (Sh.Ct.) 26; *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342, C.A. and *King v. Liverpool City Council* [1986] 1 W.L.R. 890, C.A. considered.

Squires v. Perth and Kinross District Council, 1986 S.L.T. 30 doubted.

Decision of the First Division of the Inner House of the Court of Session, 1986 S.L.T. 272 affirmed.

The following cases are referred to in their Lordships' opinions:

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.)

Arneil v. Schnitzer (1944) 173 Or. 179; 144 P.2d 707

Bolton v. Stone [1951] A.C. 850; [1951] 1 All E.R. 1078, H.L.(E.)

Bourhill v. Young [1943] A.C. 92; 1942 S.C.(H.L.) 78; [1942] 2 All E.R. 396, H.L.(Sc.)

Carrick Furniture House Ltd. v. Paterson, 1978 S.L.T. (Notes) 48

Cattle v. Stockton Waterworks Co. (1875) L.R. 10 Q.B. 453, D.C.

Donoghue v. Stevenson [1932] A.C. 562; 1932 S.C.(H.L.) 31, H.L.(Sc.)

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

Evans v. Glasgow District Council, 1978 S.L.T. 17

Fraser v. Glasgow Corporation, 1972 S.C. 162

Goldman v. Hargrave [1967] 1 A.C. 645; [1966] 3 W.L.R. 513; [1966] 2 All E.R. 989, P.C.

Graham (Thomas) & Co. Ltd. v. Church of Scotland General Trustees, 1982 S.L.T. (Sh.Ct.) 26

Haynes v. Harwood [1935] 1 K.B. 146, C.A.

Herrington v. British Railways Board [1972] A.C. 877; [1972] 2 W.L.R. 537; [1972] 1 All E.R. 749, H.L.(E.)
Hughes v. Lord Advocate [1963] A.C. 837; 1963 S.C.(H.L.) 31; [1963] 2 W.L.R. 779; [1963] 1 All E.R. 705, H.L.(Sc.)
Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 201, H.L.(Sc.)
King v. Liverpool City Council [1986] 1 W.L.R. 890; [1986] 3 All E.R. 544, C.A.
Lamb v. Camden London Borough Council [1981] Q.B. 625; [1981] 2 W.L.R. 1038; [1981] 2 All E.R. 408, C.A.
Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd. [1985] Q.B. 350; [1985] 2 W.L.R. 289; [1985] 2 All E.R. 44, C.A.
Muir v. Glasgow Corporation, 1943 S.C.(H.L.) 3, H.L.(Sc.)
Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.
Perl (P.) (Exporters) Ltd. v. Camden London Borough Council [1984] Q.B. 342; [1983] 3 W.L.R. 769; [1983] 3 All E.R. 161, C.A.
Prince v. Chehalis Savings & Loan Association (1936) 186 Wash. 372; 58 P.2d 290; 61 P.2d 1374
Scott's Trustees v. Moss (1889) 17 R. 32
Sedleigh-Denfield v. O'Callaghan [1940] A.C. 880; [1940] 3 All E.R. 349, H.L.(E.)
Smith v. Leurs (1945) 70 C.L.R. 256
Squires v. Perth and Kinross District Council, 1986 S.L.T. 30
Stansbie v. Troman [1948] 2 K.B. 48; [1948] 1 All E.R. 599, C.A.
Torrack v. Corpamerica Inc. (1958) 144 A.2d 703
Weld-Blundell v. Stephens [1920] A.C. 956, H.L.(E.)

The following additional cases were cited in argument:

Harvey v. Singer Manufacturing Co. Ltd., 1960 S.C. 155
Longworth v. Coppas International (U.K.) Ltd., 1985 S.L.T. 111
McLoughlin v. O'Brian [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.)
Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210; [1984] 3 W.L.R. 953; [1984] 3 All E.R. 529, H.L.(E.)
Playtex (U.K.) Ltd. v. Kelman (unreported), 12 February 1985; (1985) Outer House Cases 24 (Court of Session)

CONSOLIDATED APPEALS from the First Division of the Inner House of the Court of Session.

These were consolidated appeals by, in the first appeal, the pursuers, the Reverend Frank T. Smith, William G. Kerr and Archibald D. Crawford, respectively minister, session clerk and clerk of the deacon's court of St. Paul's Church of Scotland, Canmore Street, Dunfermline, and, in the second appeal, the pursuer, Angelo Maloco, from interlocutors of the First Division of the Inner House of the Court of Session (Lord Emslie (Lord President), Lord Grieve and Lord Brand), 1986 S.L.T. 272, given on 19 November 1985. The First Division by their interlocutors allowed reclaiming motions by the defenders in both causes, Littlewoods Organisation Ltd., for review of interlocutors of the Lord Ordinary, Lord Cowie, dated 23 March 1984, pronouncing awards in favour of the pursuers, recalled the interlocutors and assoilzied the defenders from the conclusions of the summons and decern.

The facts are set out in the opinion of Lord Mackay of Clashfern.

Ranald MacLean Q.C. and *Donald Mackay* (both of the Scottish Bar) for the pursuers. (a) The Lord Ordinary and the judges of the First Division were correct in holding that the test of reasonable foreseeability was the correct test to be applied in determining the duties that rested on the defenders with regard to their liability to make reparation for loss and damage following on the conduct of third parties: see *Donoghue v. Stevenson* [1932] A.C. 562; 1932 S.C.(H.L.) 31; *Bourhill v. Young* [1943] A.C. 92; 1942 S.C.(H.L.) 78; *Muir v. Glasgow Corporation,* 1943 S.C.(H.L.) 3; *Harvey v. Singer Manufacturing Co. Ltd.,* 1960 S.C. 155 and *Squires v. Perth and Kinross District Council,* 1986 S.L.T. 30. Where loss and damage are caused by the conduct of third parties, liability of a defender to a pursuer for that loss and damage depends on whether such conduct was, in all the circumstances of the particular case, a reasonably foreseeable consequence of the defender's acts and omissions: see *Scott's Trustees v. Moss* (1889) 17 R. 32; *Haynes v. Harwood* [1935] 1 K.B. 146 and *Squires v. Perth and Kinross District Council.*

(b) The defenders ought reasonably to have foreseen that, if they took no steps to watch the unoccupied cinema premises with a view to keeping them secure and no steps to maintain their security, children and young people would be attracted to them, would be liable to enter them, forcibly or otherwise, and would do so repeatedly in increasing numbers. The defenders ought to have foreseen such events inter alia because of the fact that the building had been a cinema, which would be an interesting place for children and young people to explore, the location of the cinema premises in the centre of Dunfermline, the location of the cinema premises set back from the High Street but near to the café of the pursuer Maloco, which was frequented by young people, the location of fire doors and windows giving access to the cinema premises from Macpherson's Close and the West Close, the fact that once inside the cinema premises children and young people would be out of view and unchecked and the absence of any action on the part of the defenders themselves to repair any breach of security which might occur. The Lord Ordinary and the judges of the First Division accepted these contentions.

(c) The defenders ought reasonably to have foreseen that, if their cinema premises were repeatedly entered by children and young people, whether forcibly or otherwise, such children and young people would be liable to include vandals intent on acts of wanton destruction. The defenders ought to have done so inter alia because vandalism by children and young people is a well known occurrence. Members of the general public are well aware of the occurrence and nature of vandalism. The consequences of acts of vandalism are frequently and readily visible in the community. The activities of vandals and criminal proceedings resulting from their activities are regularly reported in the media. Vandals commit various types of wanton damage. Fire-raising is a frequent form of vandalism. In Scotland fire-raising is prosecuted inter

alia by the common law crime of reckless fire-raising and wilful fire-raising. Acts of fire-raising that do not constitute wilful fire-raising can also be prosecuted by the statutory offence of vandalism: see section 78 of the Criminal Justice (Scotland) Act 1980. It is well known to the general public, and in particular within judicial knowledge, that fire-raising by vandals occurs in empty premises: see, e.g., *Evans v. Glasgow District Council*, 1978 S.L.T. 17; *Carrick Furniture House Ltd. v. Paterson*, 1978 S.L.T.(Notes) 48; *Thomas Graham & Co. Ltd. v. Church of Scotland General Trustees*, 1982 S.L.T.(Sh.Ct.) 26 and the opinion of the Lord Ordinary. These cases and section 78 of the Act of 1980 were all cited in the Inner House as indicating the scope of public and judicial knowledge with regard to wilful fire-raising being a form of vandalism, especially in unoccupied premises. The sheriff court is the principal court before which this sort of question comes, and the *Thomas Graham* case was decided by a very experienced sheriff. In the present case the construction of the cinema premises was such that once vandals were inside they were able to engage in acts of wanton destruction hidden from the view of members of the public outside the cinema premises. In particular, they had the opportunity to light fires without being observed. The cinema premises contained various materials lying around, which were suitable for use in starting fires. These materials included Dralon seats, paper, cardboard boxes, carpets, paper and film. In all the circumstances of the present case, it ought to have been reasonably foreseeable to the defenders that vandals intent on fire-raising were liable to enter the cinema premises. The possibility of fire occurring within the cinema premises was foreseen by two witnesses. A senior employee of the defenders stated in evidence that, had he been aware that the cinema premises were insecure, he would have taken steps to secure them to prevent the entry of vandals and any damage that such vandals might have caused. *Playtex (U.K.) Ltd. v. Kelman* (unreported), 12 February 1985; (1985) Outer House Cases 24, referred to in the opinion of Lord Brand, is distinguishable from the present case. In that case, the fire was not started in an area concealed from public view that held any particular attraction for children and young people. In any event, the fire, when it was lit, was not lit as an act of vandalism.

(d) Separatim, the defenders admit that, as owners and occupiers of the cinema premises, it was their duty to take reasonable care for the safety of premises adjoining. Had they fulfilled that duty by taking steps to watch the premises inter alia to prevent children and young people from entering them, it is likely that they would have discovered the occurrence of the two fires started by vandals prior to 5 July 1976. With, inter alia, knowledge of those fires, they ought reasonably to have foreseen that any vandals who entered the cinema premises were liable to start further fires.

(e) The defenders ought reasonably to have foreseen that, if a fire was started in the cinema premises, it was likely to spread within the building and take hold of it. It was not necessary for the pursuers to prove precisely how the fire was started, nor how it spread through the cinema premises: see *Hughes v. Lord Advocate* [1963] A.C. 837; 1963 S.C.(H.L.) 31. The defenders ought to have foreseen the spread of fire

throughout the cinema building because (a) a fire can develop quickly and extensively, however small its origins; (b) the nature of the exterior of the cinema premises was such that a fire inside the building might not readily be noticed from outside the building until some time after the fire had started; (c) apart from the seats, cinema equipment and some piping that had been removed, the premises were in a fully fitted condition.

(f) The judges of the First Division have taken too narrow a view of what in the circumstances was reasonably foreseeable. On the facts admitted and proved, the defenders ought reasonably to have foreseen that, if they took no steps to watch the unoccupied cinema premises with a view to keeping them secure and to maintaining them in a secure state, vandals were liable to enter them and cause various acts of wanton damage within them, including the lighting of fires that might spread within the cinema premises, take hold of them and create the danger of damage to neighbouring property, such as the first pursuers' church and other buildings. Accordingly, the defenders were under the duties to take reasonable care to keep and maintain the cinema premises lockfast, to employ a caretaker to watch over the premises to prevent the entry of vandals and to cause regular inspection to be made of the premises and to lock or board up any doors or windows found to be open or smashed.

(g) The defenders failed in said duties, and, had they fulfilled them, the fire on 5 July 1976 would not have occurred, causing the loss and damage suffered by the pursuers.

As to the duty of care that was owed by the defenders in the light of the facts, they admit that they owed a duty of care to take care for the safety of adjoining premises. The question is whether they owed the particular duty in the circumstances to take reasonable care to maintain the security of their building so as to prevent or minimise the risk of unauthorised entry and in particular such entry by vandals (i.e. those intent on destroying) with the reasonable and probable consequence of damage to others (i.e. those who might foreseeably be injured if the duty were not complied with).

Depending on the particular circumstances, for human conduct to be reasonably foreseeable the degree of probability of its occurring *may* have to be high. One may have to say that it is very likely to occur before being satisfied that it is reasonably foreseeable. It is not justifiable to lay down rules for every case that involves foresight of human conduct. [Reference was made to *Squires v. Perth and Kinross District Council*, 1986 S.L.T. 30.] It is not therefore justifiable to insist in every case that there *must* be a "special relationship," and that the conduct *must* be "very likely" to occur before any duty can be said to arise. So to insist would be to lose the essential flexibility necessary for the application of the modern concept of culpa. If one occupies a flat above a jeweller's shop, one may be under a duty not to make it unduly attractive to burglars. It is always a question of degree in each case how the conflict is to be resolved as to whether it is reasonable to take steps and where it is reasonable that the loss should fall. This building had an attraction for children: cf. *Hughes v. Lord Advocate* [1963] A.C. 837;

1963 S.C.(H.L.) 31. It was reasonably foreseeable that children, if they did gain access, would cause damage inside without limit. As the First Division said, vandalism includes setting fire. The pursuers need prove no more than that damage by fire was foreseeable. The First Division took far too narrow a view of what was foreseeable: see *Muir v. Glasgow Corporation*, 1943 S.C.(H.L.) 3, 10 (Lord Macmillan). Each case would have to be regarded on its own merits and the various principles reconciled. It may be the view of the law (see *per* Lord Reid in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1027) that owners should in general not be liable in respect of burglars, etc.

The pursuers' arguments as presented to the Court of Session, which they repeat before the House, took the following steps. 1. By reason of the particular features of this building, it was reasonably foreseeable by the occupiers that young persons would be, or were likely to be, attracted to it and would attempt to overcome such security as there was and gain entry. A cinema would be an allurement. 2. It was reasonably foreseeable that, if the building was insecure and remained insecure, it would be entered by an increasing number of young persons. 3. It was reasonably foreseeable that a proportion of such young persons would be intent on causing damage within the building, which might have an effect on adjoining properties, as indeed happened on both sides of the building. The First Division agreed with a witness who said that vandalism was something that was always in one's mind. 4. It was reasonably foreseeable that such damage would include damage by fire. Fire, being unpredictable in its behaviour, could take hold on the fabric of the building. (It was with this step in the argument that the First Division had difficulty.) 5. It was reasonably foreseeable that, if a fire gained hold on the building, it would consume it and that, the building being large in terms of open space, the fire would readily spread to adjoining properties.

Alan Johnston Q.C. and *D. A. Y. Menzies* (both of the Scottish Bar) for the defenders. The defenders do not propose to maintain the following arguments advanced before the First Division: (a) on the assumption that it was established that they had failed to fulfil their duty of care owed generally to the neighbouring proprietors, that the Lord Ordinary was not entitled to hold that, if the precautions desiderated by the pursuers had been taken by the defenders, the cinema would probably not have been set on fire; (b) that the Lord Ordinary erred in law in determining the appropriate cost of reinstatement of a new church building. The defenders do not challenge the approach of the First Division to damages.

The decision of the First Division was sound in all respects. In particular: (1) on the evidence (i) the defenders knew nothing of the insecurity of the premises, nor of the two minor incidents involving fire before 5 July 1976; although many people knew of the condition of the premises, and although the defenders' name appeared on the front of the cinema building as purchasers of the building, none of those people informed the police or the defenders of what was going on there; (ii) there was nothing in the nature or construction of the premises themselves that was particularly inflammable or that was a natural

allurement or invitation to persons intending to set fire to buildings (cf. *Squires v. Perth and Kinross District Council*, 1986 S.L.T. 30); (iii) there was nothing in the items left in the premises that was particularly inflammable or that was a natural allurement or invitation to persons intending to set fire to buildings (cf. *Fraser v. Glasgow Corporation*, 1972 S.C. 162 and *Playtex (U.K.) Ltd. v. Kelman* (unreported), 12 February 1985; (1985) Outer House Cases 24); and (iv) whatever may have been the state of knowledge individuals of fires being started, no one anticipated any damage to the building arising therefrom, let alone to neighbouring properties.

(2) There was nothing in the way of a special relationship between the defenders and the persons who started the fire that should have alerted the defenders to the risk of a major or any fire as a reasonably foreseeable event, and liability depends, on one view, on the existence of such a relationship (cf. *Scott's Trustees v. Moss*, 17 R. 32; *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004; *McLoughlin v. O'Brian* [1983] 1 A.C. 410; *Lamb v. Camden London Borough Council* [1981] Q.B. 625 and *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342).

It is not enough for the pursuers to show that the defenders owed general duties of neighbourhood; they must go on to establish that a particular duty of care was incumbent on the defenders in light of a particular type of risk that was reasonably foreseeable (cf. *Bourhill v. Young* [1943] A.C. 92; 1942 S.C.(H.L.) 78 and *Longworth v. Coppas International (U.K.) Ltd.*, 1985 S.L.T. 111).

In the present case, although the pursuers do not need to establish the precise means whereby a major fire was likely to be started, they do need to establish that the particular type of risk—namely, a major fire—was reasonably foreseeable (*Hughes v. Lord Advocate* [1963] A.C. 837; 1963 S.C.(H.L.) 31).

There is nothing in the circumstances of this case to establish that the defenders ought reasonably to have foreseen that, if they took no steps to inspect these premises frequently and maintain their security against intrusion by children and young persons, a major fire would be likely to be started that would be likely to engulf the building and damage properties in the vicinity.

The defenders approach their argument on a narrow and a broad front. On the narrow front, applying the test of reasonable forseeability the pursuers have not established the existence of a risk of sufficient magnitude to have obliged the defenders to adopt in advance of the fatal fire the only one of the prescribed remedies that would have avoided its occurrence.

On the broad front, the policy of the law should in any event deny the pursuers a remedy, for two reasons: (i) there would otherwise be an unreasonable invasion of the basic right of a person to do with his property as he pleases; (ii) by reference to the implifications that success for the pursuers might have, with particular reference to the potential obligations of those who leave property unoccupied, even for a short time.

A This case does not contain any specialities. There is nothing that puts it in a special category because it is a cinema per se. There was nothing in the building that gave rise to a special fire hazard. Critically, the defenders were in ignorance of that state of affairs that actually gave rise to the disaster. They were not negligent in being so ignorant. They owed no duty, in the context of this case, to make themselves so aware.

B These types of cases are not to be determined only on the basis that the consequence in question was reasonably foreseeable or that there is liability only if it was very likely. Other considerations come in, such as whether it is appropriate to impose this burden on the property owner per se. In *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342 if the burglars, instead of burrowing through a wall, had set a fire, the position would have been the same. [Reference was made

C to *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C 210 and *King v. Liverpool City Council* [1986] 1 W.L.R. 890.]

Returning to the narrow position, the important facts are that there was nothing in the nature of this lock-fast building that put it in the "allurement" category and that nobody brought the state of the building to the defenders' attention. The case is thus to be distinguished from

D *Haynes v. Harwood* [1935] 1 K.B. 146 in that defenders did not consciously leave the property in the state that led to the damage. The analogy would be that in *Haynes v. Harwood* the defendants' driver had tied the horse up but someone had let it loose.

As to whether there was a duty to inspect, nobody concerned thought that the church was at risk through fire. The evidence does not

E admit of a risk of sufficient magnitude to have warranted action. A watchman would have been the only practicable remedy.

As to whether, assuming that it would have been reasonable to take some step, it is consistent with public policy that such an action as this should not lie, see *Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1985] Q.B. 350. It would be inappropriate for the House to make an invasion into the principle that one should be allowed to do what one

F likes with one's own property.

MacLean Q.C. replied.

Their Lordships took time for consideration.

5 February. Lord Keith of Kinkel. My Lords, I have had the

G advantage of considering in draft the speeches to be delivered by my noble and learned friends Lord Mackay of Clashfern and Lord Goff of Chieveley. I agree with them, and for the reasons they give would dismiss these appeals.

Lord Brandon of Oakbrook. My Lords, it is axiomatic that the

H question whether there has been negligence in any given case must depend on the particular circumstances of that case. That being so, I do not think that these appeals can in the end be determined by reference to other reported cases in which the particular circumstances were different, even though some degree of analogy between such other cases

and the present one can legitimately be drawn. Nor do I think that it is possible, however helpful it might otherwise be, to lay down any general principle designed to apply to all cases in which the negligence alleged against a person involves the unauthorised acts of independent third parties on premises owned or occupied by that person.

The particular facts of the present case appear to me to raise two, and only two, questions, on the answers to which the determination of the appeals depends.

The first question is what was the general duty owed by Littlewoods, as owners and occupiers of the disused cinema, to the appellants, as owners or occupiers of other buildings near to the cinema. The answer to that question is, in my view, that Littlewoods owed to the appellants a duty to exercise reasonable care to ensure that the cinema was not, and did not become, a source of danger to neighbouring buildings owned or occupied by the appellants.

The second question is whether that general duty encompassed a specific duty to exercise reasonable care to prevent young persons obtaining unlawful access to the cinema, and, having done so, unlawfully setting it on fire. The answer to that question, in accordance with general principles governing alike the law of delict in Scotland and the law of negligence in England, must depend on whether the occurrence of such behaviour was reasonably foreseeable by Littlewoods. It should have been reasonably foreseeable by Littlewoods if they had known of the activities of young persons observed by certain individuals in the locality. But they did not know of such activities because the individuals concerned did not inform either Littlewoods or the police of them, nor did the police themselves observe them. In the absence of information about such activities, either from the individuals referred to or from the police, I am of opinion that the occurrence of the behaviour in question was not reasonably foreseeable by Littlewoods. I conclude, therefore, that the general duty of care owed by Littlewoods to the appellants did not encompass the specific duty referred to above.

For these reasons I would dismiss the appeals.

Lord Griffiths. My Lords, I regard these appeals as turning upon the evaluation and application of the particular facts of this case to a well established duty and standard of care. I agree so fully with the statement and evaluation of the facts appearing in the speech of my noble and learned friend, Lord Mackay of Clashfern, that I can state my own reasons for dismissing these appeals very shortly.

The duty of care owed by Littlewoods was to take reasonable care that the condition of the premises they occupied was not a source of danger to neighbouring property.

The standard of care required of them was that stated in general terms by Lord Radcliffe in *Bolton v. Stone* [1951] A.C. 850, 868–869 and expanded in more particularity by Lord Wilberforce in *Goldman v. Hargrave* [1967] 1 A.C. 645, 662–663 when dealing with a fire upon premises caused by an outside agency. I refrain from citing these passages as both appear in the speech of my noble and learned friend, Lord Mackay of Clashfern.

A Listening to the seductive way in which Mr. MacLean developed his argument on the facts step-by-step, as described by Lord Mackay, I was reminded of the fable of the prince who lost his kingdom but for the want of a nail for the shoe of his horse. A series of foreseeable possibilities were added one to another and, hey presto, there emerged at the end the probability of a fire against which Littlewoods should have guarded. But, my Lords, that is not the common sense of this B matter.

The fire in this case was caused by the criminal activity of third parties upon Littlewoods' premises. I do not say that there will never be circumstances in which the law will require an occupier of premises to take special precautions against such a contingency but they would surely have to be extreme indeed. It is common ground that only a 24- C hour guard on these premises would have been likely to prevent this fire, and even that cannot be certain, such is the determination and ingenuity of young vandals.

There was nothing of an inherently dangerous nature stored in the premises, nor can I regard an empty cinema stripped of its equipment as likely to be any more alluring to vandals than any other recently vacated premises in the centre of a town. No message was received by D Littlewoods from the local police, fire brigade or any neighbour that vandals were creating any danger on the premises. In short, so far as Littlewoods knew, there was nothing significantly different about these empty premises from the tens of thousands of such premises up and down the country. People do not mount 24-hour guards on empty properties and the law would impose an intolerable burden if it required E them to do so save in the most exceptional circumstances. I find no such exceptional circumstances in this case and I would accordingly dismiss the appeals.

I doubt myself if any search will reveal a touchstone that can be applied as a universal test to decide when an occupier is to be held liable for a danger created on his property by the act of a trespasser for whom he is not responsible. I agree that mere foreseeability of damage F is certainly not a sufficient basis to found liability. But with this warning I doubt that more can be done than to leave it to the good sense of the judges to apply realistic standards in conformity with generally accepted patterns of behaviour to determine whether in the particular circumstances of a given case there has been a breach of duty sounding in negligence.

G Lord Mackay of Clashfern. My Lords, the defenders and respondents in these consolidated appeals, to whom I shall refer as "Littlewoods," purchased the Regal Cinema in the centre of Dunfermline from its previous owners with entry on 31 May 1976. Littlewoods' intention was to demolish the cinema within a short time and to replace it by a supermarket. On 5 July 1976, in consequence of a fire which began in the cinema, a café and billiard saloon which lay close to the H cinema on the west known as the Café Maloco was seriously damaged and St. Paul's Church which lay also to the west but at a slightly greater distance from the cinema was so substantially damaged that it had to be demolished. Dunfermline lies within the area of the Fife constabulary.

The issues in both actions are the same and they have been heard together at every stage. The owners of the affected properties to whom I shall refer as "the appellants" claimed against Littlewoods for the damage done to their properties alleging that the damage was caused by negligence on the part of Littlewoods. Littlewoods, in turn, claimed that if they were at fault the Chief Constable of the Fife Constabulary or his officers were also at fault and he should be held liable to make a contribution to the award made against Littlewoods. The Lord Ordinary held that the claims had been established against Littlewoods and pronounced awards in favour of both owners. He found that Littlewoods' case against the Chief Constable had not been established. Littlewoods accepted the decision relating to the Chief Constable but reclaimed against the awards which had been made against them. The First Division of the Inner House of the Court of Session, 1986 S.L.T. 272, unanimously allowed the reclaiming motions and recalled the Lord Ordinary's interlocutors. The First Division also dealt with matters relating to the size of the award made in favour of the owners of St. Paul's Church.

The appellants have now appealed to this House and have argued that the Lord Ordinary's interlocutors should be restored, subject to alteration in the amount awarded in favour of the owners of St. Paul's Church. No question relating to the size of the awards remains outstanding between the parties; they are agreed on the amounts to be awarded if the appeals succeed.

The cinema comprised a substantial brick-built auditorium with a balcony at the north end and a flat timber and felt covered roof on a steel frame. It was reached from the High Street by a lengthy foyer partly of similar construction and otherwise traditionally stone-built and slated, three storeys in height. The main building of the cinema was set back a considerable distance from the High Street. To the east of the cinema entrance in the High Street there was a passageway known as Macpherson's Close which ran down the length towards the south on the east side of the main building. Immediately to the south of the main building lay the car park to which entry was gained from Canmore Street lying to the south of the property. Macpherson's Close was regularly used by the public as a short cut from Canmore Street to the High Street. Another close known as the West Close ran from the north side of the car park round the west side of the main building and then at the north end of the main building turned eastwards to join Macpherson's Close. This last section of the West Close passed under the section of the cinema which connected its main building with the front entrance in the High Street. On the west side of West Close was Café Maloco and to the south-west of the cinema and beyond certain properties lying immediately to the west of the West Close lay St. Paul's Church, which was a Victorian Gothic building with a small wooden turret. The main building of the cinema had a number of exit or fire doors with locking bars designed to be opened only from the inside which were set in the walls of the cinema.

The last showing of a film in the cinema took place on 29 May 1976. Although legal entry was given on 31 May 1976 the keys were not

handed over to Littlewoods until about 14 June. During that period the previous owners employed contractors to remove fittings and equipment from the cinema which were worth taking away but which were of no interest to Littlewoods. Before these contractors had finished their task contractors employed by Littlewoods arrived at the premises to make certain site investigations and to do some preliminary work on foundations. Littlewoods' contractors were present and working for about three weeks; the first two were spent in the area of the cinema car park and thereafter they spent about four days working inside the premises. From about the end of the third week in June 1976 the cinema remained empty and unattended by any persons employed by or giving services to Littlewoods.

The evidence established that children began to overcome the security of the cinema building by breaking into it in one way or another in the period of about four days when Littlewoods' contractors were doing preliminary work inside the premises during or towards the end of the third week in June 1976. Although these contractors locked and secured the premises when they finished work each night, they discovered on their return in the mornings clear signs that the premises had been forcibly entered. Some of the fire doors had been forced open from inside and the locking bars had been broken. The contractors then had to secure the doors which had been so affected by tying them with rope to the stage. When they finished their work they left the premises as secure as they could make them. Thereafter the security of the premises was again overcome by children and young persons; and children and young persons resorted to the premises with increasing regularity for play, horseplay and the pleasure of making a mess and breaking whatever they could find to break. The Lord Ordinary held that it was amply established that by the first few days of July 1976 anyone with half an eye who made use of Macpherson's Close could have seen that the main building of the cinema was no longer lockfast and was being regularly entered by unauthorised persons. Paper and debris were scattered about the auditorium, and in Macpherson's Close outside the building debris increased, consisting of bricks, glass and old films. During the time that Littlewoods' contractors were working inside the main building one of the contractors' employees saw lengths of old cinema film lying in Macpherson's Close and noticed signs of someone having attempted to set fire to them. The type of film used in the cinema was non-inflammable and no fire had occurred. About the end of June Mr. Scott, who was the beadle of St. Paul's Church and of another church in the vicinity, saw signs of someone having tried to light a fire inside the building. His attention had been attracted because some children had run out of the building as he approached. When he went inside he found that the carpet, where oil had been spilled on it, was burning. He put it out very easily by stamping on it and told Mr. Kerr, the session clerk of St. Paul's, about it. Neither Mr. Scott nor anyone else informed the police or Littlewoods about any of these matters. As the Lord Ordinary put it:

> "Nevertheless, in spite of these obvious signs of the building having been violated by unauthorised persons, no one saw fit to report the

matter to the police or to attempt to bring it to the attention of the defenders or their representatives.

A notice at the front of the cinema contained the necessary particulars of Littlewoods.

On 5 July 1976 about 6.30 p.m. a large ceramic sink from a toilet on the top floor of the main building of the cinema landed on the roof of the billiard saloon in Café Maloco. It was thrown from a window on the west side of the cinema by boys of 13 or 14 years of age. The police were called and detained two boys.

Between 8.00 and 9.00 p.m. on the same day a passer-by noticed three teenagers come out of Macpherson's Close and soon after she saw smoke coming from the close. The police and the fire brigade were called but the fire which started in the south-west corner of the balcony soon engulfed the whole building. The efforts of the fire brigade were impeded by inability to get a supply of water from the fire hoses.

The Lord Ordinary concluded, and there was no challenge to the correctness of his conclusion, that the fire which started on 5 July 1976 was deliberately started by children or teenagers and that the teenagers that the passer-by saw emerging from Macpherson's Close shortly before the smoke started to come out were probably responsible. Apart from the contractors employed by Littlewoods, to whom I have referred, the only person employed by Littlewoods who gave evidence was a member of the architectural department who was responsible for the design and supervision of the construction of buildings for the company. He visited the cinema about the middle of June and according to his evidence it was secure at that time.

The claims are based on the allegation that Littlewoods, as owners and occupiers of the Regal cinema, had a duty to take reasonable care for the safety of premises adjoining; that they knew or ought to have known that a disused cinema would be a ready target for vandals; and that they knew or ought to have known that their cinema was, in fact, the subject of extensive vandalism and that if they did not take steps to prevent the entry of vandals not only would such vandals cause damage to Littlewoods' property, whether by fire or otherwise, but further such fire might spread and cause damage to adjoining properties. In these circumstances, it was claimed that Littlewoods had a duty to take reasonable care to keep and maintain the premises lockfast, to cause frequent and regular inspection to be made and to lock and board up any doors and windows found to be open or smashed and to employ a caretaker to watch over the premises and to prevent the entry of vandals. In the course of the hearing before your Lordships counsel for the appellants accepted that, in the light of the evidence, the only precaution that was likely to be effective in preventing the entry of vandals was to arrange for a 24-hour watch to be maintained on the premises. Littlewoods, while accepting that as owners and occupiers of the premises they had a duty to take reasonable care for the safety of premises adjoining, strenuously denied that they owed the duties on which these claims are founded.

The Lord Ordinary, after examining the authorities, concluded that whether such duties were owed by Littlewoods or not depended on the answer to the question

A "bearing in mind that [Littlewoods] had no control over the children and teenagers, was it reasonably foreseeable by [Littlewoods] that, by failing to keep the cinema lockfast and to inspect it regularly during the last half of June and the first few days of July 1976, children and young persons would not only enter it, but start a fire?"

B He considered that it was appropriate that he should treat this as a jury question and try to answer it as a jury would. He said:

"In the absence of any evidence about the lighting of fires, it would have been difficult to say that it was 'very likely' that children and young persons breaking into these premises would start a fire, but in the present instance there is evidence that on two occasions C shortly before 5 July 1976 witnesses saw signs of someone having tried to start a fire. . . . I accept that there is a very narrow dividing line in the circumstances of this case between bare foreseeability and reasonable foreseeability, but having applied my mind to that problem I have reached the conclusion that the lighting of a fire in the premises by children or teenagers was in the circumstances reasonably foreseeable."

D This conclusion he reached with some hesitation.

Before the First Division it was accepted by the appellants that, on the evidence, Littlewoods had no knowledge of the attempts to start fires to which the Lord Ordinary referred in the passage I have quoted and that, accordingly, in considering whether Littlewoods were bound E reasonably to foresee that as a consequence of their inaction a fire would be started in their building and not only engulf it but cause damage to buildings nearby, these required to be left out of account unless it could be said that they had a duty to know of them. If they had not such a duty the Lord Ordinary's decision on this crucial matter was open for review by the judges of the First Division. The judges of the F First Division unanimously concluded that the question was at large for their consideration and that in the circumstances it had not been shown that it was reasonably to be foreseen by Littlewoods that if they took no steps to discourage widespread use of the cinema by youngsters, including vandals, one or more of them, or some other intruder, would be likely deliberately to set fire to the building or deliberately to set such a fire in such a place as would be likely to engulf the building.

G Mr. MacLean for the appellants in his very persuasive submissions to your Lordships suggested that this crucial question should be approached in stages. First he submitted that by reason of the particular features of this building it was reasonably foreseeable by Littlewoods that young persons were likely to be attracted to the building and would attempt to overcome such security as there was and would attempt to gain entry. The second submission was that it was reasonably foreseeable that if the H building was insecure and remained insecure it would be entered. Further, it was reasonably foreseeable that a proportion of such young persons would be intent on causing damage within the building which might have an effect on adjoining property. The fourth step in the

argument was that it was reasonably foreseeable that such damage would include damage by fire which, being unpredictable, was likely to take hold of the fabric of the building. And the final step in the logical progression was that it was reasonably foreseeable that if the fire took hold of the building it would engulf the building and, since the building was large, the fire would readily spread to adjoining properties.

In support of these submissions and particularly the submission that it was reasonably foreseeable that such damage would include damage by fire, Mr. MacLean referred to three decisions in which conduct of this kind had come to the notice of the courts: *Evans v. Glasgow District Council*, 1978 S.L.T. 17, in which it was alleged that one of the forms vandalism had taken in that case was that ignited material had been dropped through damaged floors of a flat above the pursuer's premises with the consequence that the contents of these premises were destroyed almost entirely; *Carrick Furniture House Ltd v. Paterson*, 1978 S.L.T. (Notes) 48, in which it was alleged that persons had entered and deliberately set fire to the premises in question; and thirdly, *Thomas Graham & Co. Ltd. v. Church of Scotland General Trustees*, 1982 S.L.T. (Sh.Ct.) 26, in which vandals had entered a church and set it on fire. Mr. MacLean also referred to the Criminal Justice (Scotland) Act 1980, section 78, in which while defining the statutory offence of vandalism as committed by "any person who, without reasonable excuse, wilfully or recklessly destroys or damages any property belonging to another" Parliament excepted from that offence what would constitute the offence of wilful fire-raising. From that statutory provision, and these instances, Mr. MacLean argued that it was right that the court should take notice that one of the forms in which persons wilfully or recklessly destroy or damage property belonging to others is by wilful fire-raising.

He further referred to *Hughes v. Lord Advocate* [1963] A.C. 837; 1963 S.C.(H.L.) 31 as demonstrating the unpredictability of children's behaviour as a factor to be taken into account in dealing with a question such as is raised here.

Mr. MacLean submitted further, and anticipating what might be urged against him, that although the actions that caused the fire were those of vandals over whom Littlewoods had no control, his case was founded on the need that arose in consequence of the likely results of allowing vandals into the building to take precautions to keep them out. The test of whether such precautions should be taken was, in Mr. MacLean's submission, whether it was reasonably foreseeable by Littlewoods that if they did not take these precautions there was a substantial risk that the neighbouring properties would be damaged. He referred particularly to *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 and to the speech of Lord Reid where, referring to the well-known passage in Lord Atkin's speech in *Donoghue v. Stevenson* [1932] A.C. 562, 580, Lord Reid said, at p. 1027:

> "[It] should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has

A come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion."

Mr. MacLean submitted that it would not be right to regard damage caused by persons over whom the defender has no control as excluded from this statement of principle. Rather, said Mr. MacLean, one should take account of actions of third parties over whom the defender has no B control in considering the consequences of acts or omissions on the defender's part. He referred in support of this submission to the later passages in Lord Reid's speech where he dealt with this question. As an illustration of this approach being taken in Scotland, he referred to *Squires v. Perth and Kinross District Council*, 1986 S.L.T. 30, in which jewellers successfully sued building contractors who were working in a C flat above their shop for not adequately securing the flat against entry by thieves. A thief entered the jewellers' premises through the flat by climbing up a drain pipe at the back of the property to which he obtained access by climbing over a building. A substantial quantity of jewellery was stolen.

For Littlewoods Mr. Johnston submitted that on the findings of fact in the present case Littlewoods had not established, applying the test of D reasonable foreseeability, the existence of a risk sufficient to have obliged Littlewoods to adopt in advance of the catastrophic fire the only one of the prescribed remedies that might have avoided that occurrence, namely, having the premises watched all the time. He also advanced a broader proposition that the policy of the law should deny these claims, first because they involved an unwarranted invasion of the basic right of E a person to use his property as he pleased and, secondly, because affirming these claims implied potential obligations on those who leave property unoccupied for a comparatively short time that would be unduly heavy having regard to the purpose intended to be served. Or, putting the matter another way, he submitted that the law should put the responsibility for securing the safety and security of property against vandals on the owner or occupier of the property and not on F neighbouring owners or occupiers from whose property damage by vandals and thieves might be caused. In support of the submission that affirming the claims in the present case would have the result of placing unduly heavy burdens on the owners or occupiers of property, he pointed out that there was no evidence that this building was in any way a special fire hazard, nor was there evidence that this part of Dunfermline G was specially subject to vandalism.

In approaching these rival submissions it has to be borne in mind that the damage to the neighbouring properties, upon which the claims against Littlewoods are founded, is damage by fire or otherwise resulting from vandalism in Littlewoods' premises. A duty of care to prevent this damage is the only duty alleged to be incumbent upon Littlewoods relevant to this case. From this it follows that unless Littlewoods were H bound reasonably to anticipate and guard against this danger, they had no duty of care, relevant to this case, requiring them to inspect their premises. Unless, therefore, Littlewoods, on taking control of these premises without any knowledge of the subsequent history of the

property after they assumed control, ought reasonably to have anticipated that they would be set on fire and thus or otherwise create a substantial risk of damage to neighbouring properties if they did not take precautions, the claims must fail. By approaching the matter in five logical steps, Mr. MacLean made it appear easier to reach the result for which he contended than it would be if one assumed only Littlewoods' proved state of knowledge and asked whether, in that state of knowledge, they were to anticipate, as a reasonable and probable consequence of their inaction, that a substantial risk of fire damage to their neighbours was created. As I have said, the Lord Ordinary's answer to the basic question in the case depended, and depended critically, on his assumption that Littlewoods were to be taken as aware of the evidence relating to the attempt to start a fire in the lane with the abandoned film and to the smouldering carpet which Mr. Scott extinguished. It is plain from the way in which the Lord Ordinary expresses his opinion that, had it not been for his reliance upon that evidence against Littlewoods, he would not have found against them. There was no evidence that Littlewoods knew of these matters. Unless they had a duty to inspect there is no basis on which it can be alleged that they ought to have known of them. Since the only basis on which any relevant duty of care is said to arise is that damage to neighbouring properties was to be anticipated unless it were exercised, in considering whether such damage should have been anticipated one cannot assume that any of the relevant duties should have been performed. I conclude that the Lord Ordinary was not entitled to assume that Littlewoods should have known of these matters. The First Division concluded, as I have said, that the matter was at large for their consideration. In my opinion, their Lordships of the First Division applied their minds to the correct question. In my opinion, the question whether, in all the circumstances described in evidence, a reasonable person in the position of Littlewoods was bound to anticipate as probable, if he took no action to keep these premises lockfast, that, in a comparatively short time before the premises were demolished, they would be set on fire with consequent risk to the neighbouring properties is a matter for the judges of fact to determine. Once it has been determined on the correct basis, an appeal court should be slow to interfere with the determination: see, for example, Lord Thankerton in *Muir v. Glasgow Corporation*, 1943 S.C.(H.L.) 3, 8, and Lord Porter in *Bolton v. Stone* [1951] A.C. 850, 860.

The cases to which Mr. MacLean drew attention in his argument, and section 78 of the Act of 1980, illustrate that a consequence of this kind, if premises are left unoccupied, is a possibility, but the extent to which such an occurrence is probable must depend on the circumstances of the particular case. While no doubt in this case, as the judges in the courts below have found, it was probable that children and young persons might attempt to break into the vacated cinema, this by no means establishes that it was a probable consequence of its being vacated with no steps being taken to maintain it lockfast that it would be set on fire with consequent risk of damage to neighbouring properties. A telling point in favour of Littlewoods is that, although Littlewoods' particulars were shown on a board prominently displayed at the front of

the premises, no one made any protest to them about the state of the premises, or indicated to them any concern that, unless they took some action, neighbouring premises were at risk. If, in the light of the common knowledge in the neighbourhood, it had been anticipated that the cinema might be set on fire, with consequent risk to adjoining properties, I should have thought the persons concerned with the safety of adjoining properties, who were certainly among those acquainted with the situation, would have communicated their anxieties to Littlewoods. Neither is there evidence that the police were ever informed of the situation with regard to the cinema, and this I would take as further confirmation that, in the circumstances, no one anticipated any adverse consequences arising from it. It is true that Mr. Scott, the beadle, spoke of anxiety for the safety of children, and also made some reference, in that connection, to the possibility of fire, but any concern he had was not apparently sufficiently substantial to prompt him to take any action whatever in the way of seeking to have the situation remedied by the owners or the police.

This is sufficient for the disposal of these appeals but in view of the general importance of some of the matters raised in the parties' submissions it is right that I should add some observations on these.

First, Mr. MacLean urged us to say that the ordinary principle to be deduced from Lord Atkin's speech in *Donoghue v. Stevenson* [1932] A.C. 562 should apply to cases where the damage in question was caused by human agency. It is plain from the authorities that the fact that the damage, upon which a claim is founded, was caused by a human agent quite independent of the person against whom a claim in negligence is made does not, of itself, preclude success of the claim, since breach of duty on the part of the person against whom the claim is made may also have played a part in causing the damage. In dealing with the submission in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 that the claim must fail because there was a general principle that no person can be responsible for damage caused by the acts of another who is not his servant nor acting on his behalf, Lord Reid, having quoted from *Haynes v. Harwood* [1935] 1 K.B. 146, and from *Scott's Trustees v. Moss* (1889) 17 R. 32, said, at p. 1030:

> "These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskilful

navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely." A

It has to be borne in mind that Lord Reid was demonstrating only that the submission with which he was dealing was incorrect. If a person can be responsible for damage caused by acts of another who is not his servant nor acting on his behalf that sufficed to answer the question that Lord Reid had before him in the respondent's favour. It was accordingly B not critical whether the test was foreseeability of that damage as likely or very likely. At the stage at which Lord Reid used the phrase "very likely" he was giving his view on what the two cases he had cited showed. In the first of these, the phrase used (*per* Greer L.J. [1935] 1 K.B. 146, 156) is "the very kind of thing which is likely to happen," and in the second, the consequence that was being considered was described in the passage quoted from Lord President Inglis, 17 R. 32, C 36, as "the natural and almost inevitable consequence" of the defender's action which was the foundation of the claim. When Lord Reid turns to state his own position, he does so on the basis that the intervening action was likely to happen. In *Muir v. Glasgow Corporation*, 1943 S.C.(H.L.) 3, the issue was whether the defender's manageress was negligent in allowing two members of a picnic party to bring a tea urn D along a passage in her tea room without taking certain precautions. The damage in question, in that case, might therefore have arisen from the conduct of the two persons carrying the tea urn, who were not employees of the defenders nor in any way accountable to them. The test of liability set out by Lord Macmillan in *Bourhill v. Young* [1943] A.C. 92, 104, namely:

> "The duty to take care is the duty to avoid doing or omitting to do E anything the doing or omitting to do which may have as its reasonable and *probable* consequence injury to others, and the duty is owed to those to whom injury may reasonably and *probably* be anticipated if the duty is not observed" (emphasis mine),

was expressly used by Lord Thankerton and Lord Macmillan. Lord F Wright said, 1943 S.C.(H.L.) 3, 16:

> "As to negligence, the two men [who were carrying the urn] were not their [i.e. the defenders'] servants. They were not responsible for their acts. That the men should be negligent in so simple an operation was not likely to happen. It was a mere possibility, not a reasonable probability. The men, if negligent, were, no doubt, G responsible for their own negligence, but from the standpoint of the appellants the risk of negligence was a mere unlikely accident which no responsible person in [the manageress's] position could naturally be expected to foresee."

Lord Romer expressed it only slightly differently when he said, at p. 19:

> "In my opinion, the appellants can only be fixed with liability if it H can be shown that there materialised a risk that ought to have been within the appellants' reasonable contemplation."

Lord Clauson said, at p. 19:

A "The crucial question in this matter appears to me to be whether [the manageress] ought as a reasonable woman to have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected."

There is no hint that any special qualification fell to be introduced into B the test in consequence of the urn being carried by two persons not in the employment of the defenders and for whom they would have no vicarious responsibility.

It is true, as has been pointed out by Oliver L.J. in *Lamb v. Camden London Borough Council* [1981] Q.B. 625, 642, that human conduct is particularly unpredictable and that every society will have a sprinkling of C people who behave most abnormally. The result of this consideration, in my opinion, is that where the only possible source of the type of damage or injury which is in question is agency of a human being for whom the person against whom the claim is made has no responsibility, it may not be easy to find that as a reasonable person he was bound to anticipate that type of damage as a consequence of his act or omission. The more unpredictable the conduct in question, the less easy to affirm that any D particular result from it is probable and in many circumstances the only way in which a judge could properly be persuaded to come to the conclusion that the result was not only possible but reasonably foreseeable as probable would be to convince him that, in the circumstances, it was highly likely. In this type of case a finding that the reasonable man should have anticipated the consequence of human action as just E probable may not be a very frequent option. Unless the judge can be satisfied that the result of the human action is highly probable or very likely he may have to conclude that all that the reasonable man could say was that it was a mere possibility. Unless the needle that measures the probability of a particular result flowing from the conduct of a human agent is near the top of the scale it may be hard to conclude that it has risen sufficiently from the bottom to create the duty reasonably to F foresee it.

In summary I conclude, in agreement with both counsel, that what the reasonable man is bound to foresee in a case involving injury or damage by independent human agency, just as in cases where such agency plays no part, is the probable consequences of his own act or omission, but that, in such a case, a clear basis will be required on G which to assert that the injury or damage is more than a mere possibility. To illustrate, it is not necessary to go further than the decision of this House in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004 where I consider that all the members of the majority found such a possible basis in the facts that the respondent's yacht was situated very close to the island on which the Borstal boys escaped from their custodians, that the only effective means of avoiding recapture was to escape by the use H of some nearby vessel, and that the only means of providing themselves with the means to continue their journey was likely to be theft from such nearby vessels. These considerations so limited the options open to the escaping boys that it became highly probable that the boys would

use, damage or steal from one or more of the vessels moored near the island.

The matter is further illustrated by *Thomas Graham & Co. Ltd. v. Church of Scotland General Trustees*, 1982 S.L.T. (Sh.Ct.) 26, in which Sheriff Macvicar Q.C. found that the area in which the defender's church lay was subject to vandalism on a large scale, that on an inspection of the church in which representatives of the owners of the church took part shortly before the final fire evidence existed of small fires having already been lit in its interior and that, on that inspection, the official reporting to the local authority concerned with public safety had reported that the building should be demolished since it constituted a serious fire hazard. Sheriff Macvicar concluded that by not taking the very obvious and inexpensive precaution of securing the side door of the church by which apparently access had been obtained the defenders had failed in their duty to take reasonable care for the safety of their neighbour's property. This decision appears to me to be in accordance with the decision of your Lordship's House in *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, establishing the occupier's liability with regard to a hazard created on his land by a trespasser, of which he has knowledge, when he fails to take reasonable steps to remove it. On Sheriff Macvicar's findings, the empty church building constituted a serious fire hazard unless it were effectively secured against further trespass.

Before leaving cases relating to fires, I should mention *Evans v. Glasgow District Council*, 1978 S.L.T. 17 and *Carrick Furniture House Ltd. v. Paterson*, 1978 S.L.T. (Notes) 48, already referred to as illustrations cited by Mr. MacLean of vandalism taking the form of wilful fire-raising. In the first of these, *Evans*, the defenders had demolished premises which adjoined the pursuer's premises which were also leased from the defenders, and in doing so had damaged the lock securing the pursuer's doors which had been replaced with inadequate locks. The pursuer suffered loss as a result of (1) theft of goods by the persons who broke the new and inadequate locks; (2) fire caused by vandals dropping lighted material through gaps left by the defenders in floorboards above the pursuer's premises; and (3) water which escaped from the defender's premises as a result of vandals interfering with the plumbing there. The case is reported at the stage of relevancy where the defenders were arguing that the pursuer's allegations, even if fully established, would not justify their claim. In these circumstances, Lord Wylie said, at p. 19:

> "it seems to me that it would be entirely in accordance with principle to hold that in such circumstances there was a general duty on owners or occupiers of property, particularly property of the tenement type, where they chose to leave it vacant for any material length of time, to take reasonable care to see that it was proof against the kind of vandalism which was calculated to affect adjoining property."

I do not read Lord Wylie as there deciding that such a duty in the circumstances necessarily had been incumbent on the defenders. He was

simply saying that principle would allow the claim and therefore it would not be right to sustain the defenders' submission. In my view that amounted only to a decision that depending on the facts as they emerged a duty of the scope alleged might be incumbent on owners or occupiers of such property in some circumstances that fell within the allegations made by the pursuer. *Carrick Furniture* which followed is explicable on the same ground. Counsel for Littlewoods founded on the decision in *Fraser v. Glasgow Corporation*, 1972 S.C. 162, particularly a dictum of the Lord Justice-Clerk (Grant), at p. 173, but the circumstances in which he declined to hold a injury foreseeable were so different from those in the present case and so special that I find it of no assistance in this case.

I turn now to consider the cases in the Court of Appeal in England founded on by counsel for Littlewoods in support of his broad submission. The first of these, *Lamb v. Camden London Borough Council* [1981] Q.B. 625, was a decision that a workman damaging a water pipe with his pick in such a way that settlement was occasioned to the foundations of the plaintiff's house was not reasonably bound to foresee as a consequence of that for which he and his employers should be liable damage done to the plaintiff's house by squatters who obtained access because the house was not adequately secured against their entry when it was empty in order that repairs might be carried out. Both Lord Denning M.R. and Oliver L.J. dealt fully with the speech of Lord Reid in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, to which I have already referred, and concluded that he was propounding "highly likely" as the degree of probability required before liability for the wrongful act of a third party could be established against a defendant. It will be apparent that my understanding of Lord Reid's speech, in its context, is somewhat different from theirs. While I do not consider that it is correct to base the decision in *Lamb v. Camden London Borough Council* [1981] Q.B. 625 on a proposition as a matter of policy that no wrongdoer could ever be liable for outrageous or anti-social conduct that had followed his wrongdoing and had contributed to the damage resulting therefrom, I respectfully and entirely agree with the result to which the Court of Appeal came in that case, and particularly with the reason for it expressed by Oliver L.J. where he said, at p. 643:

> "I confess that I find it inconceivable that the reasonable man wielding his pick in the road in 1973 could be said reasonably to foresee that his puncturing of a water main would fill the plaintiffs' house with uninvited guests in 1974."

The next case referred to was *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342, in which the plaintiffs were tenants of the defendants who used the basement of the demised premises in accordance with the terms of the lease for the storage of garments. The defendants were also the owners of the adjoining premises. These premises had a broken lock on the front door. Unauthorised persons were often seen on those premises and burglaries had also taken place there, but the defendants had done nothing about complaints regarding lack of security. During a weekend, intruders

entered the basement of the premises adjoining the plaintiffs' premises, knocked a hole through the wall separating that basement from the plaintiffs' basement, and stole some knitwear belonging to the plaintiffs from their basement. The plaintiffs brought an action against the defendants claiming damages for negligence. The Court of Appeal held that the claim failed. Waller and Oliver L.JJ. held that, although it was a foreseeable possibility that thieves might gain access through the defendants' property to the plaintiffs' property, the defendants were not reasonably bound to foresee as the natural and probable consequence of their omission to secure their premises that persons over whom they had no control would steal the plaintiffs' goods. My noble and learned friend, Lord Goff of Chieveley, as Robert Goff L.J., gave the third judgment. He quoted, at p. 359, from Dixon J. in *Smith v. Leurs* (1945) 70 C.L.R. 256, 262, a passage which was cited with approval in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004. The full passage, cited in *Dorset*, is at pp. 261–262:

> "But, apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature."

Robert Goff L.J. went on, at pp. 359–360:

> "It is of course true that in the present case the plaintiffs do not allege that the defendants should have controlled the thieves who broke into their storeroom. But they do allege that the defendants should have exercised reasonable care to prevent them from gaining access through their own premises; and in my judgment the statement of principle by Dixon J. is equally apposite in such a case. I know of no case where it has been held, in the absence of a special relationship, that the defendant was liable in negligence for having failed to prevent a third party from wrongfully causing damage to the plaintiff."

Earlier he had made reference to *Stansbie v. Troman* [1948] 2 K.B. 48, in which a decorator who had contracted to carry out work in the plaintiff's home went out for a time when no one else was in the house, leaving the door unsecured. In consequence, a thief entered and removed some of the plaintiff's property from the house and the plaintiff succeeded in recovering damages against the decorator. There was in that case no special relationship between the decorator and the thief

A although there was a contract between the decorator and the plaintiff. I should have thought that on the same facts, a guest of the plaintiff's who had left property in the house, if it had been stolen, might also have succeeded in recovering damages in respect of that theft from the decorator. That case proceeded on the basis that the decorator was liable because it was "as a direct result of his negligence that the thief
B entered by the front door" (*per* Tucker L.J., at p. 52). I think it could be said that the purpose of the security arrangements at the door of the house was to prevent unlawful intrusion, that a reasonable man, in the decorator's position, would have secured the door, and that, on analysis, his reason for doing so would have been to prevent the consequence which he ought reasonably to have foreseen of unauthorised intrusion and theft from the house whose door it was. On the other hand, if the
C thief, instead of confining his attention to the house whose door it was, bored a hole through the wall into the house next door, and stole items from the adjoining proprietor, assuming that the first house was in a terrace or semi-detached, I consider that the decorator would not be liable in respect of the adjoining proprietor's loss, in the absence of circumstances from which this was shown to be reasonably foreseeable.

D If the proprietor of the first house returned in time to find the thief boring a hole in the wall with the intention of effecting entry to the adjoining house, in the light of the decision in *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 80 I consider that the first proprietor would be under a duty of care to the second proprietor to take what reasonable steps were open to him to cause the boring to cease. In some sense a thief who goes through one proprietor's property in order to reach the
E adjoining property of his neighbour creates a special relationship between himself and the first proprietor as a user of the first proprietor's land. In my opinion, therefore, the reason that in the circumstances of *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342 no duty was owed by the defendants to Perl was that the defendants were not bound as reasonable occupiers to foresee that, if they took no
F steps to improve the security of their property, a probable consequence of that was that thieves would first unlawfully enter their property and then, by making an opening in the dividing wall or otherwise, use the defendants' property to make an entry into the property of Perl for the purpose of stealing goods belonging to Perl. Although a duty to prevent a person from unlawfully entering my property may, in a sense, be
G described as a duty to control that person, I would not consider this a very natural use of the word "control." Control signifies, to my mind, a more extended relationship than would be involved in simply keeping another off my property. If this be right, the duty alleged by Perl to be incumbent on Camden was a duty falling under the earlier part of Dixon J.'s dictum, as giving rise to responsibility on the ground that the act of the thief could not have taken place but for the fault or breach of
H duty of the defendant but not to a duty of care with reference to the control of actions or conduct of the thief. Like Oliver L.J. in *Perl*, at p. 357G, I would regard the mode of entry in question in that case to the plaintiffs' premises as a foreseeable possibility and no more, and in my

view, that reasoning amply supports the decision of the Court of Appeal in *Perl*.

The somewhat analogous case of *Squires v. Perth and Kinross District Council*, 1986 S.L.T. 30, to which I have already referred, in the Second Division of the Court of Session, so far as it was based on the fact that the defending contractors, having by their work seriously reduced the security of the flat above the shop premises, failed to take adequate steps temporarily to secure it when they were absent, was decided by an application of what, in my opinion, was the correct test. Like Lord Dunpark, I have the greatest difficulty in seeing, in view of the mode of entry which the thief actually used, that the alleged breach of duty was in any way related to the particular manner in which the theft occurred.

The decision in *Perl* was applied in *King v. Liverpool City Council* [1986] 1 W.L.R. 890, in which the question of damage by vandals to property again arose. The plaintiff was the tenant of a flat in a block of flats owned by the defendant. When the flat immediately above the plaintiff's flat became vacant, she requested the defendant to board it up so as to secure it against intruders. The defendant took no effective steps to secure the upper flat and on three occasions vandals broke in and damaged water pipes in that flat allowing water to escape down into the plaintiff's flat where it caused damage. The plaintiff claimed damages against the defendant, alleging that it owed her a duty of care so to secure the vacant flat as to prevent vandals gaining access to it. The trial judge found that it would not have been possible to take effective steps in the situation disclosed in the evidence which could defeat the activities of vandals and dismissed the plaintiff's claim. The plaintiff appealed.

The Court of Appeal (Purchas and Nicholls L.JJ. and Caulfield J.) dismissed the appeal. After referring to a number of authorities, Purchas L.J. said, at p. 901:

> "The judge's finding is, in my judgment, determinative of this appeal. Summarizing his judgment, he said: 'Regrettably . . . I find that it is not possible for effective steps to be taken in a situation like this which could defeat the activities of vandals.' Whether this finding, together with the established circumstances of the council, should operate to restrict the ambit of the duty to take any positive steps to secure the property, or duty arising in relation to an omission to take such steps; or whether it operates to break the chain of causation, may, as Robert Goff L.J. suggested in [the] passage which I have just cited from *Paterson Zochonis Ltd. v. Merfarken Packaging Ltd.* [1983] F.S.R. 273, 299, not be essentially material. Personally I prefer the former approach and would limit the area of the duty itself in the circumstances prevailing in this case. In either event, in my judgment the judge was right to hold that the council owed no duty to the plaintiff in respect of the acts of the vandals in this case and accordingly I would dismiss this appeal."

Nicholls L.J. agreed but added, in relation to an argument for the plaintiff that *King's* case was to be distinguished from *Perl's* case, at pp. 901–902:

A "I am unable to accept that any material ground of distinction exists between the two cases. In *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342, as in the instant case, the plaintiff sought to make the defendant occupier liable in negligence for the wrongdoing of a third party. In his judgment Robert Goff L.J. set out, at p. 359 . . . some examples of circumstances where there may be liability for a third party's
B wrongdoing, and concluded that those instances were very different from that case where, as in the present case, the allegation was that the defendant failed to exercise reasonable care to prevent a third party from causing damage to the plaintiff. In his preface to that passage Robert Goff L.J. assumed that there might well be cases where the occupier could reasonably foresee that thieves might use
C the unprotected property as a means of access to neighbouring property. But he, in common with the other members of the court, rejected the existence of the broad duty of care contended for by the plaintiff's counsel, and his conclusion was to the effect that in the absence of a special relationship, there was no duty to prevent thieves from so using one's property. I cannot see any distinction in principle between a case where the damage arises from the third
D party using the defendant's property as a means of obtaining unauthorised access to the plaintiff's property and there committing theft, and one where the damage arises from the third party so conducting himself on the defendant's property as to damage the plaintiff's property by causing water to escape from the former property to the latter. Nor can I see that it is material that the
E defendant had a responsibility to take reasonable steps to prevent the escape from its property of water in an ordinary domestic water system. I do not consider that there is a greater responsibility on the defendant because the third party caused damage by creating an escape of water than if the damage had been caused by the third party lighting a fire on the defendant's property or, if the defendant's property had been on the top floor of the building, by the third
F party stripping lead from the roof and thereby permitting rain to enter and eventually to reach and damage the plaintiff's property."

Caulfield J. agreed with both judgments.

The conclusion of fact that no effective precautions on the lines suggested by the plaintiff could be taken by the defendant to prevent the
G damage suffered by the plaintiff was amply sufficient to justify the conclusion reached by the Court of Appeal in *King v. Liverpool City Council* [1986] 1 W.L.R. 890. Leave to appeal to this House from the decision was refused to the plaintiff.

However, while it may well be true that no distinction of legal principle falls to be made between the various cases referred to by Nicholls L.J., I consider that there may be important differences in the
H facts which could justify different results.

Cases of theft where the thief uses a neighbour's premises to gain access to the premises of the owner of the stolen goods are, in my opinion, in an important respect different from cases of fire such as that

with which your Lordships are concerned in the present appeal. In the case of fire, a hazard is created on the first occupier's premises and it is that hazard which operating from the first occupier's premises creates danger to the neighbouring properties. As I have said, even although that hazard is created by the act of a trespasser on the first premises the occupier of these premises, once he knows of the physical facts giving rise to the hazard, has a duty to take reasonable care to prevent the hazard causing damage to neighbouring properties. In the ordinary case of theft where the thief uses the first proprietor's property only as an access to the property of the person from whom the stolen property is taken there is no similar hazard on the first proprietor's land which causes the damage to the neighbouring property. Success of the theft depends very much on its mode and occasion being unexpected. The only danger consists in the thief or thieves who, having passed from trespassing on the first proprietor's property, go on to trespass on his neighbour's. There is also a sense in which neighbouring proprietors can, independently, take action to protect themselves against theft in a way that is not possible with fire. Once the fire had taken hold on Littlewoods' building, St. Paul's proprietors could not be expected to take effective steps to prevent sparks being showered over on their property. On the other hand, in the jewellery case (*Squires v. Perth and Kinross District Council*, 1986 S.L.T. 30) there was no reason why the pursuers if they had anticipated the risk of theft as sufficiently serious should not have had a burglar alarm which would prove effective to warn of burglars whatever their mode of entry although this would not, of itself, prevent their entry.

Where the question is whether or not the duty to take a particular precaution is incumbent on a defendant, the probability of the risk emerging is not the only consideration, as was pointed out by Lord Reid giving the opinion of the board in *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.* [1967] 1 A.C. 617. In reference to *Bolton v. Stone* [1951] A.C. 850 Lord Reid said, at pp. 642–643:

> "The House of Lords held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it. But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity, there can be little doubt but that *Bolton v. Stone* would have been decided differently. In their Lordships' judgment *Bolton v. Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such

that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it."

In my opinion this observation demonstrates that when the word "probable" is used in this context in the authorities, it is used as indicating a real risk as distinct from a mere possibility of danger. It is not used in the sense that the consequence must be more probable than not to happen before it can be reasonably foreseeable. And again, in *Goldman v. Hargrave* [1967] 1 A.C. 645, Lord Wilberforce giving the opinion of the board, referring to a number of textbooks as well as an article by Dr. A. L. Goodhart, said, at pp. 662–663:

> "All of these endorse the development which their Lordships find in the decisions, towards a measured duty of care by occupiers to remove or reduce hazards to their neighbours. So far it has been possible to consider the existence of a duty, in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be 'reasonable,' since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast has, ex hypothesi, had this hazard thrust upon him through no seeking or fault of his own. His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as, for example, in Scrutton L.J.'s hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able-bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more."

My Lords, I think it is well to remember as Lord Radcliffe pointed out in *Bolton v. Stone* [1951] A.C. 850, 868–869:

"a breach of duty has taken place if they show the appellants guilty of a failure to take reasonable care to prevent the accident. One may phrase it as 'reasonable care' or 'ordinary care' or 'proper care'—all these phrases are to be found in decisions of authority—but the fact remains that, unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty."

This is the fundamental principle and in my opinion various factors will be taken into account by the reasonable man in considering cases involving fire on the one hand and theft on the other but since this is the principle the precise weight to be given to these factors in any particular case will depend upon the circumstances and rigid distinctions cannot be made between one type of hazard and another. I consider that much must depend on what the evidence shows is done by ordinary people in like circumstances to those in which the claim of breach of duty arises.

In my view, if the test of the standard of the reasonable man is applied to the steps an occupier of property must take to protect neighbouring properties from the hazard of fire arising on his property no further consideration of policy arises that should lessen the responsibility of the occupier in a case such as this.

Mr. Johnston's broad submission does not therefore add anything to his narrow submission in the circumstances of this case since, in my opinion, no undue burdens are put upon property occupiers by the application of the principle of *Donoghue v. Stevenson* [1932] A.C. 562 nor is there any undue interference with the freedom of a person to use his property as he pleases.

In my opinion, these appeals should be refused and the interlocutors of the First Division affirmed. The appellants must pay Littlewoods' costs of the appeals.

Lord Goff of Chieveley. My Lords, the Lord President founded his judgment on the proposition that the defenders, who were both owners and occupiers of the cinema, were under a general duty to take reasonable care for the safety of premises in the neighbourhood.

Now if this proposition is understood as relating to a general duty to take reasonable care *not to cause damage* to premises in the neighbourhood (as I believe that the Lord President intended it to be understood) then it is unexceptionable. But it must not be overlooked that a problem arises when the pursuer is seeking to hold the defender responsible for having failed to *prevent* a third party from causing damage to the pursuer or his property by the third party's own deliberate wrongdoing. In such a case, it is not possible to invoke a general duty of care; for it is well recognised that there is no *general* duty of care to prevent third parties from causing such damage. The point is expressed very clearly in *Hart and Honoré, Causation in the Law,* 2nd ed. (1985), when the authors state, at pp. 196–197:

"The law might acknowledge a general principle that, whenever the harmful conduct of another is reasonably foreseeable, it is our duty

A to take precautions against it . . . But, up to now, no legal system has gone so far as this . . ."

The same point is made in *Fleming, The Law of Torts*, 6th ed. (1983), where it is said, at p. 200: "there is certainly no *general* duty to protect others against theft or loss." I wish to add that no such general duty exists even between those who are neighbours in the sense of being B occupiers of adjoining premises. There is no general duty upon a householder that he should act as a watchdog, or that his house should act as a bastion, to protect his neighbour's house.

Why does the law not recognise a general duty of care to prevent others from suffering loss or damage caused by the deliberate wrongdoing of third parties? The fundamental reason is that the common law does C not impose liability for what are called pure omissions. If authority is needed for this proposition, it is to be found in the speech of Lord Diplock in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, where he said, at p. 1060:

> "The very parable of the good Samaritan (Luke 10, v. 30) which was evoked by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. D 562 illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English law."

Lord Diplock then proceeded to give examples which show that, carried E to extremes, this proposition may be repugnant to modern thinking. It may therefore require one day to be reconsidered, especially as it is said to provoke an "invidious comparison with affirmative duties of good-neighbourliness in most countries outside the common law orbit" (see *Fleming, The Law of Torts*, 6th ed., p. 138). But it is of interest to observe that, even if we do follow the example of those countries, in all probability we will, like them, impose strict limits upon any such F affirmative duty as may be recognised. In one recent French decision, the condition was imposed that the danger to the claimant must be "grave, imminent, constant . . . nécessitant une intervention immédiate," and that such an intervention must not involve any "risque pour le prévenu ou pour un tiers": see *Lawson and Markesinis, Tortious liability for unintentional harm in the Common law and the Civil law* (1982), G vol. I, pp. 74–75. The latter requirement is consistent with our own law, which likewise imposes limits upon steps required to be taken by a person who is under an *affirmative* duty to prevent harm being caused by a source of danger which has arisen without his fault (see *Goldman v. Hargrave* [1967] 1 A.C. 645), a point to which I shall return later. But the former requirement indicates that any affirmative duty to prevent deliberate wrongdoing by third parties, if recognised in English law, is H likely to be strictly limited. I mention this because I think it important that we should realise that problems like that in the present case are unlikely to be solved by a simple abandonment of the common law's present strict approach to liability for pure omissions.

Another statement of principle, which has been much quoted, is the observation of Lord Sumner in *Weld-Blundell v. Stephens* [1920] A.C. 956, when he said, at p. 986: "In general . . . even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do." This dictum may be read as expressing the general idea that the voluntary act of another, independent of the defender's fault, is regarded as a novus actus interveniens which, to use the old metaphor, "breaks the chain of causation." But it also expresses a general perception that we ought not to be held responsible in law for the deliberate wrongdoing of others. Of course, if a duty of care is imposed to guard against deliberate wrongdoing by others, it can hardly be said that the harmful effects of such wrongdoing are not caused by such breach of duty. We are therefore thrown back to the duty of care. But one thing is clear, and that is that liability in negligence for harm caused by the deliberate wrongdoing of others cannot be founded simply upon foreseeability that the pursuer will suffer loss or damage by reason of such wrongdoing. There is no such general principle. We have therefore to identify the circumstances in which such liability may be imposed.

That there are special circumstances in which a defender may be held responsible in law for injuries suffered by the pursuer through a third party's deliberate wrongdoing is not in doubt. For example, a duty of care may arise from a relationship between the parties, which gives rise to an imposition or assumption of responsibility upon or by the defender, as in *Stansbie v. Troman* [1948] 2 K.B. 48, where such responsibility was held to arise from a contract. In that case a decorator, left alone on the premises by the householder's wife, was held liable when he went out leaving the door on the latch, and a thief entered the house and stole property. Such responsibility might well be held to exist in other cases where there is no contract, as for example where a person left alone in a house has entered as a licensee of the occupier. Again, the defender may be vicariously liable for the third party's act; or he may be held liable as an occupier to a visitor on his land. Again, as appears from the dictum of Dixon J. in *Smith v. Leurs*, 70 C.L.R. 256, 262, a duty may arise from a special relationship between the defender and the third party, by virtue of which the defender is responsible for controlling the third party: see, for example, *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004. More pertinently, in a case between adjoining occupiers of land, there may be liability in nuisance if one occupier causes or permits persons to gather on his land, and they impair his neighbour's enjoyment of his land. Indeed, even if such persons come on to his land as trespassers, the occupier may, if they constitute a nuisance, be under an affirmative duty to abate the nuisance. As I pointed out in *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342, 359, there may well be other cases.

These are all special cases. But there is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. This may occur where the defender negligently causes or permits to be created a source of danger,

and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer. The classic example of such a case is, perhaps, *Haynes v. Harwood* [1935] 1 K.B. 146, where the defendant's carter left a horse-drawn van unattended in a crowded street, and the horses bolted when a boy threw a stone at them. A police officer who suffered injury in stopping the horses before they injured a woman and children was held to be entitled to recover damages from the defendant. There, of course, the defendant's servant had created a source of danger by leaving his horses unattended in a busy street. Many different things might have caused them to bolt—a sudden noise or movement, for example, or, as happened, the deliberate action of a mischievous boy. But all such events were examples of the very sort of thing which the defendant's servant ought reasonably to have foreseen and to have guarded against by taking appropriate precautions. In such a case, Lord Sumner's dictum (*Weld-Blundell v. Stephens* [1920] A.C. 956, 986) can have no application to exclude liability.

Haynes v. Harwood was a case concerned with the creation of a source of danger in a public place. We are concerned in the present case with an allegation that the defenders should be held liable for the consequences of deliberate wrongdoing by others who were trespassers on the defenders' property. In such a case it may be said that the defenders are entitled to use their property as their own and so should not be held liable if, for example, trespassers interfere with dangerous things on their land. But this is, I consider, too sweeping a proposition. It is well established that an occupier of land may be liable to a trespasser who has suffered injury on his land; though in *Herrington v. British Railways Board* [1972] A.C. 877, in which the nature and scope of such liability was reconsidered by your Lordships' House, the standard of care so imposed on occupiers was drawn narrowly so as to take proper account of the rights of occupiers to enjoy the use of their land. It is, in my opinion, consistent with the existence of such liability that an occupier who negligently causes or permits a source of danger to be created on his land, and can reasonably foresee that third parties may trespass on his land and, interfering with the source of danger, may spark it off, thereby causing damage to the person or property of those in the vicinity, should be held liable to such a person for damage so caused to him. It is useful to take the example of a fire hazard, not only because that is the relevant hazard which is alleged to have existed in the present case, but also because of the intrinsically dangerous nature of fire hazards as regards neighbouring property. Let me give an example of circumstances in which an occupier of land might be held liable for damage so caused. Suppose that a person is deputed to buy a substantial quantity of fireworks for a village fireworks display on Guy Fawkes night. He stores them, as usual, in an unlocked garden shed abutting onto a neighbouring house. It is well known that he does this. Mischievous boys from the village enter as trespassers and, playing with the fireworks, cause a serious fire which spreads to and burns down the neighbouring house. Liability might well be imposed in such a case; for, having regard to the dangerous and tempting nature of fireworks,

interference by naughty children was the very thing which, in the circumstances, the purchaser of the fireworks ought to have guarded against.

But liability should only be imposed under this principle in cases where the defender has negligently caused or permitted the creation of a source of danger on his land, and where it is foreseeable that third parties may trespass on his land and spark it off, thereby damaging the pursuer or his property. Moreover it is not to be forgotten that, in ordinary households in this country, there are nowadays many things which might be described as possible sources of fire if interfered with by third parties, ranging from matches and firelighters to electric irons and gas cookers and even oil-fired central heating systems. These are commonplaces of modern life; and it would be quite wrong if householders were to be held liable in negligence for acting in a socially acceptable manner. No doubt the question whether liability should be imposed on defenders in a case where a source of danger on his land has been sparked off by the deliberate wrongdoing of a third party is a question to be decided on the facts of each case, and it would, I think, be wrong for your Lordships' House to anticipate the manner in which the law may develop: but I cannot help thinking that cases where liability will be so imposed are likely to be very rare.

There is another basis upon which a defender may be held liable for damage to neighbouring property caused by a fire started on his (the defender's) property by the deliberate wrongdoing of a third party. This arises where he has knowledge or means of knowledge that a third party has created or is creating a risk of fire, or indeed has started a fire, on his premises, and then fails to take such steps as are reasonably open to him (in the limited sense explained by Lord Wilberforce in *Goldman v. Hargrave* [1967] 1 A.C. 645, 663–664) to prevent any such fire from damaging neighbouring property. If, for example, an occupier of property has knowledge, or means of knowledge, that intruders are in the habit of trespassing upon his property and starting fires there, thereby creating a risk that fire may spread to and damage neighbouring property, a duty to take reasonable steps to prevent such damage may be held to fall upon him. He could, for example, take reasonable steps to keep the intruders out. He could also inform the police; or he could warn his neighbours and invite their assistance. If the defender is a person of substantial means, for example a large public company, he might even be expected to employ some agency to keep a watch on the premises. What is reasonably required would, of course, depend on the particular facts of the case. I observe that, in *Goldman v. Hargrave*, such liability was held to sound in nuisance; but it is difficult to believe that, in this respect, there can be any material distinction between liability in nuisance and liability in negligence.

I turn to the authorities. Your Lordships were referred in the course of argument to two Scottish cases concerned with fire hazards. The first was *Carrick Furniture House Ltd. v. Paterson*, 1978 S.L.T. (Notes) 48. In that case, in allowing proof before answer, the Lord Ordinary (Lord Allanbridge) founded upon the facts that the building in question, which contained considerable quantities of inflammable material, constituted a

fire hazard, and that the risk of a vandal setting fire to the premises was not too remote. The case is only briefly reported; but it provides an indication that cases of this kind cannot normally be disposed of on a plea to the relevancy, but have to be allowed to go to proof. In the second case, *Thomas Graham & Co. Ltd. v. Church of Scotland General Trustees*, 1982 S.L.T. (Sh.Ct.) 26, Sheriff Macvicar Q.C. held that the defenders, who were occupiers of a disused church, were liable to the pursuers whose neighbouring property suffered damage by reason of a fire started in the church by unknown vandals. He relied (inter alia) on the facts that the church was situated in an area of Glasgow which was subject to vandalism on a large scale; that, to the knowledge of the defenders, on a number of previous occasions vandals had entered the church and caused damage there; that the vandals had also lit small fires in the church, and that a responsible inspector had expressed the opinion that the building was a serious fire hazard; that there was no evidence that the defenders, or anyone on their behalf, had applied their minds to the question of fire hazard, and that there was ample evidence to support the view that, if they had, and had taken advice on the matter, they would have been told that the building was a serious fire risk; and that, for two months before the fire, the building was not lockfast. I incline to the opinion that this case can best be classified under the second of the two heads of liability to which I have referred, on the basis that the defenders had the means of knowledge that a risk of fire had been created or was being created by third parties on their land, and yet they did nothing to prevent such risk of fire from damaging neighbouring property. The leading Commonwealth case in which an occupier of land was held liable for damage caused to his neighbour's property by a fire which started on his own land without his fault (when lightning struck a tall tree), and which he negligently failed to prevent from spreading onto his neighbour's land, is *Goldman v. Hargrave* [1967] 1 A.C. 645 itself. But a case more similar to the two Scottish cases to which I have referred is perhaps the American case of *Torrack v. Corpamerica Inc.* (1958) 144 A.2d. 703, where it was alleged that the defendant's derelict property was frequented by children and vagrants and had been condemned by the fire marshal as a fire menace, and that thereafter a fire was deliberately started by a third person on the property which spread to and damaged the plaintiff's neighbouring property; there the defendant's motion for summary judgment was denied. In so deciding, Judge Christie relied on earlier cases to the same effect, viz. *Prince v. Chehalis Savings & Loan Association* (1936) 186 Wash. 372; 58 P.2d 290; 61 P.2d 1374, and *Arneil v. Schnitzer* (1944) 173 Or. 179; 144 P.2d 707.

Turning to the facts of the present case, I cannot see that the defenders should be held liable under either of these two possible heads of liability. First, I do not consider that the empty cinema could properly be described as an unusual danger in the nature of a fire hazard. As the Lord President (Lord Emslie) pointed out, 1986 S.L.T. 272, 276: "There was nothing about the building, so far as we know from the evidence, to suggest that it could easily be set alight." This conclusion was, in my judgment, entirely justified on the evidence in the case; and it is, I

consider, fatal to any allegation that the defenders should be held liable on the ground that they negligently caused or permitted the creation of an unusual source of danger in the nature of a fire hazard.

Nor can I see that the defenders should be held liable for having failed to take reasonable steps to abate a fire risk created by third parties on their property without their fault. If there was any such fire risk, they had no means of knowing that it existed. If anybody (for example, the police) considered that there was such a risk, they could and should have contacted the defenders (a well-known public company, whose particulars were given on a notice outside the cinema) by telephone to warn them of the situation; but they did not do so. But in any event, on the evidence, the existence of such a risk was not established. As the Lord President observed, at pp. 276–277:

> "It is, in my opinion, significant that no witness who spoke about the increasing use of the cinema by intruding children—and the witnesses included the minister of St. Paul's Church, the session clerk and the beadle, and also Mr. Maloco—reported to the police or the defenders what they had observed. If it had crossed their minds that it was likely that the children would set fire to the building and put neighbouring properties at risk, it is inconceivable that they would not have taken immediate steps, by reporting to the police and the defenders, to bring the use of the premises by children to an end. My experience of life, which I am entitled to bring to bear as a juryman would, has not taught me that empty buildings, to which vandals gain access, are likely to be set on fire by them . . ."

In the course of his argument before your Lordships, Mr. MacLean placed reliance upon the decision of the Inner House of the Court of Session in *Squires v. Perth and Kinross District Council*, 1986 S.L.T. 30. That was a case concerned not with liability in respect of a fire hazard, but with liability in respect of a theft by a burglar who had gained access to the pursuer's jeweller's shop through a flat above which was empty because it was being renovated by building contractors who were held to be in occupation of the flat. It was held that the contractors, as occupiers, were liable in negligence to the pursuers for the loss of the jewellery stolen from the shop, on the ground that any person in occupancy and control of the flat above would have readily foreseen the likelihood of what in fact occurred. It appears that the fact that the flat above was empty was plainly apparent from, in particular, the presence of scaffolding at the front of the building; and complaints had been made on a number of occasions that the contractors did not keep the flat secure, for example, because windows were left open and unglazed to accommodate scaffolding. It was a remarkable feature of the case that the burglar himself, one Sneddon, gave evidence at the trial; and it transpired from his evidence that, although his attention was drawn to the possibility of breaking into the jeweller's shop through the empty flat by seeing the scaffolding and open windows of the flat facing the High Street, he in fact approached the flat from behind, climbing over a building of about 12 to 15 feet high overall. He found the door into the

yard behind the shop and flat unsecured, but nevertheless climbed over a wall into the yard and then climbed a drainpipe to a balcony, from which he entered the flat through a door which was open. Having entered the flat, he broke into the jeweller's shop through the floor of the flat and the ceiling of the shop. In these circumstances, assuming that the defenders were in breach of duty in leaving the flat insecure, I feel, with all respect, serious doubts about the decision on the issue of causation, since it is difficult to imagine that an experienced and practised housebreaker, as Sneddon was held to be, would have been deterred from entering the flat even if the door on the balcony had been secured. I am not surprised therefore to find that Lord Dunpark shared the same doubts: see at p. 40. Furthermore, I find it difficult to understand why the question of contributory negligence on the part of the pursuers was not considered. The pursuers were just as aware of the risk as the defenders were; yet, although (as was found) an alarm system is often fitted to the roof of premises such as those of the pursuers, and is relatively inexpensive, they did not take this precaution. They seem to have assumed that, although it was their shop which was likely to attract thieves, they were entitled to rely on the contractors working above, rather than upon themselves, to prevent thieves entering through the ceiling of the shop. Indeed if it had been thought appropriate, in the circumstances, to employ a watchman to guard the jeweller's shop, the pursuers would apparently have considered that that expense should fall not upon themselves but upon the contractors working above. I do not think that that can be right.

In truth the case raises a more fundamental question, which is whether an occupier is under a general duty of care to occupiers of adjacent premises to keep his premises lockfast in order to prevent thieves entering his premises and thereby gaining access to the adjacent premises. Let us suppose that, in *Squires v. Perth and Kinross District Council*, 1986 S.L.T. 30, the defenders had expressly warned the pursuers, by notice, that extensive work was going to be done to the flat above, and that this would mean that, for a period of time, scaffolding would be erected and all the windows of the flat would be removed. Would it then be objectionable that the pursuers should have to look to their own defences against thieves, in the light of these circumstances? I do not think so. Then, should it make any difference that no such notice was given, but it was obvious what the contractors were doing? Again, I do not think so. Then, suppose that the occupiers of the flat above the shop were an ordinary family and, when they went away on holiday, in all the hustle and bustle of getting their children and animals and possessions into their car, they forgot to lock their front door. While they were away a passing thief, seeing that the flat was unoccupied because the curtains were drawn, went up and tried the front door and, finding it unlocked, gained access to the flat and thence entered the jeweller's shop below and robbed it. Should the occupiers of the flat be held liable to the jewellers in negligence? Again, I do not think so; and I add that I do not think that it would make any difference that it was well known that burglars were operating in the neighbourhood. It is not difficult to multiply these homely examples of cases where a thief may

gain access to a house or flat which is not lockfast—for example, where an old lady goes out to spend the day with her married daughter and leaves a ground floor window open for her cat; or where a stone-deaf asthmatic habitually sleeps with his bedroom window wide open at night; or where an elderly gentleman leaves his french windows open when he is weeding at the bottom of his garden, so that he can hear the telephone. For my part, I do not think that liability can be imposed on an occupier of property in negligence simply because it can be said that it is reasonably foreseeable, or even (having regard, for example, to some particular temptation to thieves in adjacent premises) that it is highly likely, that, if he fails to keep his property lockfast, a thief may gain access to his property and thence to the adjacent premises. So to hold must presuppose that the occupier of property is under a general duty to *prevent* thieves from entering his property to gain access to neighbouring property, where there is a sufficient degree of foresight that this may occur. But there is no general duty to *prevent* third parties from causing damage to others, even though there is a high degree of foresight that they may do so. The practical effect is that everybody has to take such steps as he thinks fit to protect his own property, whether house or flat or shop, against thieves. He is able to take his own precautions; and, in deciding what precautions to take, he can and should take into account the fact that, in the ordinary course of life, adjacent property is likely to be from time to time unoccupied (often obviously so, and sometimes for a considerable period of time) and is also likely from time to time not to be lockfast. He has to form his own judgment as to the precautions which he should take, having regard to all the circumstances of the case, including (if it be the case) the fact that his premises are a jeweller's shop which offers a special temptation to thieves. I must confess that I do not find this practical result objectionable. For these reasons I consider, with all respect, that *Squires v. Perth and Kinross District Council*, 1986 S.L.T. 30 was wrongly decided.

The present case is, of course, concerned with entry not by thieves but by vandals. Here the point can be made that, whereas an occupier of property can take precautions against thieves, he cannot (apart from insuring his property and its contents) take effective precautions against physical damage caused to his property by a vandal who has gained access to adjacent property and has there created a source of danger which has resulted in damage to his property by, for example, fire or escaping water. Even so, the same difficulty arises. Suppose, taking the example I have given of the family going away on holiday and leaving their front door unlocked, it was not a thief but a vandal who took advantage of that fact; and that the vandal, in wrecking the flat, caused damage to the plumbing which resulted in a water leak and consequent damage to the shop below. Are the occupiers of the flat to be held liable in negligence for such damage? I do not think so, even though it may be well known that vandalism is prevalent in the neighbourhood. The reason is the same, that there is no general duty to *prevent* third parties from causing damage to others, even though there is a high degree of foresight that this may occur. In the example I have given, it cannot be

said that the occupiers of the flat have caused or permitted the creation of a source of danger (as in *Haynes v. Harwood* [1935] 1 K.B. 146, or in the example of the fireworks which I gave earlier) which they ought to have guarded against; nor of course were there any special circumstances giving rise to a duty of care. The practical effect is that it is the owner of the damaged premises (or, in the vast majority of cases, his insurers) who is left with a worthless claim against the vandal, rather than the occupier of the property which the vandal entered (or his insurers)—a conclusion which I find less objectionable than one which may throw an unreasonable burden upon ordinary householders. For these reasons, I consider that both *Lamb v. Camden London Borough Council* [1981] Q.B. 625 and *King v. Liverpool City Council* [1986] 1 W.L.R. 890 were rightly decided; but I feel bound to say, with all respect, that the principle propounded by Lord Wylie in *Evans v. Glasgow District Council*, 1978 S.L.T. 17, 19, viz. that there is

> "a general duty on owners or occupiers of property . . . to take reasonable care to see that it [is] proof against the kind of vandalism which was calculated to affect adjoining property,"

is, in my opinion, too wide.

I wish to emphasise that I do not think that the problem in these cases can be solved simply through the mechanism of foreseeability. When a duty *is* cast upon a person to take precautions against the wrongdoing of third parties, the ordinary standard of foreseeability applies; and so the possibility of such wrongdoing does not have to be very great before liability is imposed. I do not myself subscribe to the opinion that liability for the wrongdoing of others is limited because of the unpredictability of human conduct. So, for example, in *Haynes v. Harwood* [1935] 1 K.B. 146, liability was imposed although it cannot have been at all likely that a small boy would throw a stone at the horses left unattended in the public road; and in *Stansbie v. Troman* [1948] 2 K.B. 48, liability was imposed although it cannot have been at all likely that a thief would take advantage of the fact that the defendant left the door on the latch while he was out. Per contra, there is at present no general duty at common law to prevent persons from harming others by their deliberate wrongdoing, however foreseeable such harm may be if the defender does not take steps to prevent it.

Of course, if persons trespass upon the defender's property and the defender either knows or has the means of knowing that they are doing so and that in doing so they constitute a danger to neighbouring property, then the defender may be under an affirmative duty to take reasonable steps to exclude them, in the limited sense explained by Lord Wilberforce in *Goldman v. Hargrave* [1967] 1 A.C. 645, 663–664; but that is another matter. I incline to the opinion that this duty arises from the fact that the defender, as occupier, is in exclusive control of the premises upon which the danger has arisen.

In preparing this opinion, I have given careful consideration to the question whether *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342, in which I myself was a member of the Court of Appeal, was correctly decided. I have come to the conclusion that it

was, though on re-reading it I do not think that my own judgment was very well expressed. But I remain of the opinion that to impose a general duty on occupiers to take reasonable care to prevent others from entering their property would impose an unreasonable burden on ordinary householders and an unreasonable curb upon the ordinary enjoyment of their property; and I am also of the opinion that to do so would be contrary to principle. It is very tempting to try to solve all problems of negligence by reference to an all-embracing criterion of foreseeability, thereby effectively reducing all decisions in this field to questions of fact. But this comfortable solution is, alas, not open to us. The law has to accommodate all the untidy complexity of life; and there are circumstances where considerations of practical justice impel us to reject a general imposition of liability for foreseeable damage. An example of this phenomenon is to be found in cases of pure economic loss, where the so-called "floodgates" argument (an argument recognised by Blackburn J. as long ago as 1875 in *Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453, 457, the force of which is accepted not only in common law countries but also in civil law countries such as the Federal Republic of Germany) compels us to recognise that to impose a general liability based on a simple criterion of foreseeability would impose an intolerable burden upon defendants. I observe that in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520, some members of your Lordships' House succumbed, perhaps too easily, to the temptation to adopt a solution based simply upon "proximity." In truth, in cases such as these, having rejected the generalised principle, we have to search for special cases in which, upon narrower but still identifiable principles, liability can properly be imposed. That is the task which I attempted to perform in *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd.* [1985] Q.B. 350, by identifying a principle of transferred loss—a principle which has not, so far, achieved recognition by other members of your Lordships' House. As the present case shows, another example of this phenomenon is to be found in cases where the plaintiff has suffered damage through the deliberate wrongdoing of a third party; and it is not surprising that once again we should find the courts seeking to identify specific situations in which liability can properly be imposed. Problems such as these are solved in Scotland, as in England, by means of the mechanism of the duty of care; though we have nowadays to appreciate that the broad general principle of liability for foreseeable damage is so widely applicable that the function of the duty of care is not so much to identify cases where liability is imposed as to identify those where it is not (see *Anns v. Merton London Borough Council* [1978] A.C. 728, 752, by Lord Wilberforce). It is perhaps not surprising that our brother lawyers in France find themselves able to dispense with any such concept, achieving practical justice by means of a simple concept of "faute." But since we all live in the same social and economic environment, and since the judicial function can, I believe, be epitomised as an educated reflex to facts, we find that, in civil law countries as in common law countries, not only are we beset by the same practical problems, but broadly speaking we reach the same practical solutions. Our legal concepts may be different, and may cause us sometimes to

A diverge; but we have much to learn from each other in our common efforts to achieve practical justice founded upon legal principle.

For these reasons I would dismiss these appeals.

Appeals dismissed with costs.

B *Solicitors: Denton, Hall, Burgin & Warrens for Simpson & Marwick W.S., Edinburgh; Herbert Smith & Co. for Brodies W.S., Edinburgh.*

M. G.

C

[HOUSE OF LORDS]

D REGINA . . . . . RESPONDENT

AND

DONALD JOSEPH ANDREWS . . . . . APPELLANT

1986 Nov. 25, 26, 27; 1987 Feb. 5 — Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths, Lord Mackay of Clashfern and Lord Ackner

E

Crime—Evidence—Hearsay—Manslaughter—Victim attacked with knives—Victim's statement to police shortly after attack naming assailants—Death from injuries two months after attack—Whether statement admissible under res gestae exception to hearsay rule

F Two men entered M.'s flat and attacked him with knives; property was stolen. Shortly afterwards M., grievously wounded, made his way to the flat below his own to obtain assistance. Two police officers arrived within minutes and M. informed them that O. and the defendant had been the assailants. Two months later M. died as a result of his injuries. The defendant was jointly charged with O. with aggravated burglary and the murder of M. At the trial before the Common Serjeant of London and a jury the Crown sought to have the deceased's G statement admitted, not as a dying declaration, but as evidence of the truth of the facts that he had asserted, namely, that he had been attacked by O. and the defendant, and therefore admissible in the circumstances as evidence coming within the res gestae exception to the hearsay rule. The judge ruled in favour of its admissibility. The defendant was convicted of aggravated burglary and manslaughter. On appeal by the H defendant against his conviction, the Court of Appeal (Criminal Division) dismissed the appeal.

On appeal by the defendant:—

Held, dismissing the appeal, that where the victim of an attack informed a witness of what had occurred in such

circumstances as to satisfy the trial judge that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim so as to exclude the possibility of concoction or distortion and the statement was made in conditions of approximate but not exact contemporaneity, evidence of what the victim said was admissible as to the truth of the facts recited as an exception to the hearsay rule; that, accordingly, in the circumstances the deceased's statement had rightly been admitted in evidence (post, pp. 293A–C, 300E–F, G—301B, 302F).

Ratten v. The Queen [1972] A.C. 378, P.C. and *Reg. v. Turnbull* (1985) 80 Cr.App.R. 104, C.A. applied.

Myers v. Director of Public Prosecutions [1965] A.C. 1001, H.L.(E.) considered.

Reg. v. Bedingfield (1879) 14 Cox C.C. 341 overruled.

Per curiam. (i) The trial judge having ruled the statement admissible must make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the jury's attention must be invited to those matters (post, p. 302B–D).

(ii) Whatever may be the position in civil proceedings, any attempt in criminal prosecutions to use the doctrine of res gestae as a device to avoid calling, when he is available, the maker of the statement is strongly to be deprecated (post, p. 302E–F).

Decision of the Court of Appeal (Criminal Division) affirmed.

The following cases are referred to in the opinion of Lord Ackner:

Myers v. Director of Public Prosecutions [1965] A.C. 1001; [1964] 3 W.L.R. 145; [1964] 2 All E.R. 881, H.L.(E.)
Reg. v. Bedingfield (1879) 14 Cox C.C. 341
Reg. v. Blastland [1986] A.C. 41; [1985] 3 W.L.R. 345; [1985] 2 All E.R. 1095, H.L.(E.)
Reg. v. Boyle (unreported), 6 March 1986, C.A.
Reg. v. Nye (1977) 66 Cr.App.R. 252, C.A.
Reg. v. O'Shea (unreported), 24 July 1986, C.A.
Reg. v. Turnbull (1984) 80 Cr.App.R. 104, C.A.
Ratten v. The Queen [1972] A.C. 378; [1971] 3 W.L.R. 930; [1971] 3 All E.R. 801, P.C.

The following additional cases were cited in argument:

Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle (1940) 64 C.L.R. 514
Armborst v. Cincinnati Traction Co. (1928) 25 F. (2d) 240
Aveson v. Lord Kinnaird (1805) 6 East 188
Brown v. The King (1913) 17 C.L.R. 570
Dismuker v. State of Alabama (1888) 3 South.Rep. 671
Duncan v. Rhomberg (1931) 236 N.W. 638
Garner v. Township of Stamford (1903) 7 O.L.R. 50
Gilbert v. The King (1907) 38 S.C.R. 284
Green v. State of Indiana (1900) 57 N.E. 637
Holder v. The Queen [1980] A.C. 115; [1978] 3 W.L.R. 817, P.C.

Insurance Co. v. Mosley (1869) 75 U.S. 397
Jarvis v. London Street Railway Co. (1919) 48 D.L.R. 61
Keefe v. State (1937) 72 P. (2d) 425
Leahey v. Cass Ave. and F.G. Railway Co. (1888) 10 S.W. 58
Lutterell v. Reynell (1670) 1 Mod.Rep. 282
O'Hara v. Central S.M.T. Co. Ltd., 1941 S.C. 363
People v. Crosbie [1966] I.R. 490
People v. del Vermo (1908) 85 N.E. 690
People v. de Simone (1919) 121 N.E. 761
People v. Edwards (1979) 419 N.Y.S. 2d 45
People v. Marks (1959) 160 N.E. 2d 26
Reg. v. Gibson (1887) 18 Q.B.D. 537
Reg. v. Goddard (1882) 15 Cox C.C. 7
Reg. v. Lillyman [1896] 2 Q.B. 167
Reg. v. Lunny (1854) 6 Cox C.C. 477
Reg. v. McMahon (1889) 18 Ont.Rep. 502
Reg. v. Parker (1960) 45 Cr.App.R. 1, C.C.A.
Rex v. Christie [1914] A.C. 545, H.L.(E.)
Rex v. Foster (1834) 6 C. & P. 325
Rex v. Leland [1951] O.R. 12
Rex v. Woodcock (1789) 1 Leach 500
Roach v. Great Northern Railway Co. (1916) 158 N.W. 232
Schwalbe, The (1859) Swab. 521
Showalter v. West Pacific Railway Co. (1940) 106 P. 2d 895
State of Maine v. Wagner (1873) 61 Maine Rep. 178
Stobart v. Dryden (1836) 1 M. & W. 615
Sugden v. Lord St. Leonards (1876) 1 P.D. 154, C.A.
Teper v. The Queen [1952] A.C. 480; [1952] 2 All E.R. 447, P.C.
Thompson v. Trevanion (1693) Skin. 402
Travelers' Insurance Co. v. Sheppard (1890) 12 S.E. 18
Weeks v. Sparke (1813) 1 M. & S. 679

APPEAL from the Court of Appeal (Criminal Division).

This was an appeal, by leave of the House of Lords (Lord Keith of Kinkel, Lord Brightman and Lord Templeman) dated 20 March 1986, by the defendant, Donald Joseph Andrews, from the judgment dated 6 February 1986 of the Court of Appeal (Criminal Division) (Croom-Johnson L.J., Kenneth Jones J. and Sir John Thomson) dismissing his appeal from his conviction on 7 February 1985 at the Central Criminal Court before the Common Serjeant of London (Judge Thomas Pigot Q.C.) and a jury on an indictment jointly charging him with Peter Campbell O'Neill of aggravated burglary contrary to section 10(1) of the Theft Act 1968, on 13 September 1983, and the murder of Alexander Morrow on the same date. The defendant was sentenced to three years' imprisonment for the aggravated burglary and to nine years' imprisonment for manslaughter.

The Court of Appeal (Criminal Division) certified that the following point of law was involved in the decision, namely:

> "Where the victim of an attack tells a witness what has happened and does that in circumstances which satisfy the trial judge that there was no opportunity for concoction, is evidence of what the

victim said admissible as to the truth of the facts recited as an exception to the hearsay rule?" A

Leave to appeal was refused.

The facts are stated in the opinion of Lord Ackner.

Stephen Sedley Q.C. and *S. M. Solley* for the defendant. On the Common Serjeant's ruling as to the voire dire the following questions arise: (1) on the assumption that the Common Serjeant was right to treat the words spoken by the deceased as part of the res gestae, is such hearsay admissible in evidence? The judge treated the facts from the attack on the deceased to his statement to the police officers as a continuing transaction and it was for that reason that they became the res gestae. (2) If such hearsay is so admissible, how wide can the material events go before becoming inadmissible? Further, can those events relate to past events, however recent? (3) Even so, can they include statements made to police officers investigating the crime? B C

(1) The res gestae doctrine is not an exception to the hearsay rule at all. It is simply a recognition that the acts constituting the event may include words and if those words are legally probative they may be proved. But if it is sought to tender such words as proof of the truth of their contents, they are not admissible in evidence. D

As to (2) and (3) above, there are or ought to be exceptions to the admission of such hearsay: (a) material events cannot logically include a subsequent narrative of them; (b) any hearsay becomes inadmissible once it is given in contemplation of proceedings, and (c) no such evidence should be received if it carries any real possibility of error. Underlying all these submissions is the proposition that whilst the rule against hearsay has a rationale, the exceptions to it have not. In 1964 the House in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 recognised the ramshackle nature of the law of hearsay and Parliament recognised this fact and enacted the Criminal Evidence Act 1965 to rectify the gap exposed by the *Myers* case. As regards civil procedure the law was changed by the Civil Evidence Act 1968. E F

As to the decision of the Privy Council in *Ratten v. The Queen* [1972] A.C. 378, error lies in the obiter dicta in that case. They are not consonant with what is stated in *Rex v. Christie* [1914] A.C. 545; *Myers v. Director of Public Prosecutions* [1964] A.C. 1001 and *Reg. v. Blastland* [1986] A.C. 41.

The error in *Ratten v. The Queen* [1972] A.C. 378 and the way in which the Crown now seek to rely on that decision can be demonstrated in a series of propositions: (i) "res gestae" means no more than material events. (ii) To state that material events may often include what a person says is a truism. (iii) To state, however, that the truth of what a person says may be part of the material events does not make any sense at all. (iv) To make sense the proposition needs to be that the material events may be proved by what a person has said about them, but that is precisely what the hearsay rule precludes. Therefore (v), what the appellant seeks in the present case is to limit that proposition to what a person says about the material events if what a person has said is itself part of the material events. The common law has long rejected the G H

notion that the objections to the hearsay go to weight. *Reg. v. Blastland* [1986] A.C. 41, 53H et seq., lucidly states the rationale of the rule against the admission of hearsay evidence. For the exceptions to the hearsay rule, see *Cross on Evidence,* 6th ed. (1985), c. 17, sections I and II; c. 18, sections II to IV; c. 19, section I. Pages 564, 571 and 575 illustrate the heterogeneity of the exceptions to the hearsay rule.

Rex v. Foster (1834) 6 C. & P. 325 is the only clear decision in favour of the Crown's principle. Subsequent cases go contrary to the views expressed in *Foster.* Thus, for example, in the earlier case of *Aveson v. Lord Kinnaird* (1805) 6 East 188 it would appear that it was already well established that only statements which were strictly simultaneous with the res gestae were admissible as an exception to the rule. As to *Thompson v. Trevanion* (1693) Skin. 402, it is not clear to what end the statement in issue there was admitted. *Weeks v. Sparke* (1813) 1 M. & S. 679 is an important case in which Lord Ellenborough C.J. presided. It recognises at an early stage of the development of this branch of the law that the admission of hearsay evidence is to be kept within strict limits. The subsequent history of the hearsay rule is adequately dealt with in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001, 1019 et seq., *per* Lord Reid. See also p. 1027D, *per* Lord Morris of Borth-y-Gest, and p. 1030F, *per* Lord Hodson. The observations of Lord Reid at pp. 1023E, 1024B, are authority for the proposition that the apparent credibility of a statement is not a ground for making a new exception to the hearsay rule.

The above was the state of English law in which *Ratten v. The Queen* [1972] A.C. 378 was decided. It is interesting to note that *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 was neither cited in argument nor referred to in the judgment of the Board delivered by Lord Wilberforce. An analysis of that judgment shows that the first example given by Lord Wilberforce at p. 388F has nothing to do with hearsay. The second example given on p. 389 is the first to impinge on the conception of hearsay. But it is the third example which deals with hearsay. In the defendant's submission: (i) the exception is non-existent. The only authority for it is *Rex v. Foster,* 6 C. & P. 325. Alternatively, (ii) *Ratten v. The Queen* [1972] A.C. 378 has extended the exception beyond any previous authority. The real reason for limiting the exception is not because of the danger of the statement being concocted but because there is no opportunity to cross-examine on it. The passage in the middle of p. 389 is not easy to square with what is stated in *Myers* [1965] A.C. 1001, 1023E–1024G. There appear to be two different philosophies expressed in these two cases. The exception to the hearsay rule allowed in *Rex v. Foster,* 6 C. & P. 325 came too late; it is outside the growth period in this branch of the law described in the *Myers* case [1965] A.C. 1001. For many years the law as hitherto understood has been that for any act or statement to be admitted as part of the res gestae, it must be shown to be inextricably and contemporaneously connected with the transaction being inquired into: *Reg. v. Bedingfield* (1879) 14 Cox C.C. 341. The rationale of *Ratten v. The Queen* [1972] A.C. 378 is inconsistent with *Bedingfield.*

As to the cases cited in *Ratten v. The Queen* [1972] A.C. 378, in *O'Hara v. Central S.M.T. Co. Ltd.,* 1941 S.C. 363, 381, the last paragraph on that page conflates two principles. It is arguably wrongly decided. *Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle* (1940) 64 C.L.R. 514, 530 et seq., contains a valuable exposition of the law by Dixon J. in the High Court of Australia. In *Brown v. The King* (1913) 17 C.L.R. 570, 599, Isaacs and Powers JJ., accepting *Reg. v. Bedingfield,* 14 Cox C.C. 341, adopted the proposition that any act or statement admitted as part of the res gestae is not admitted on its own independent footing, but only where it is inseparably bound up with the main fact as part of the transaction itself that is inquired into.

The following cases support the appellant's narrow doctrine: *Reg. v. Goddard* (1882) 15 Cox C.C. 7; *Reg. v. McMahon* (1889) 18 Ont.Rep. 502 and *Teper v. The Queen* [1952] A.C. 480 which reiterates the historic objection to the admission of hearsay. It shows that the principle as applied to a bystander is very strict. In *Reg. v. Gibson* (1887) 18 Q.B.D. 537, which was referred to in *Teper v. The Queen* [1952] A.C. 480, it is interesting to observe that the Court of Crown Cases Reserved made no reference to the res gestae doctrine, which one would have expected if the principle enunciated in *Ratten v. The Queen* [1972] A.C. 378 were correct.

Rex v. Christie [1914] A.C. 545, shows that the doctrine for which the Crown contends in the present case will undercut all the previous law relating to statements made in the presence of the accused. For the most recent discussion in this House of the res gestae exception to the hearsay rule: see *Reg. v. Blastland* [1986] A.C. 41, 52D, 56, 58G–59C. A useful commentary on the present state of the law is to be found in *Cross on Evidence,* 6th ed., p. 589.

At the time of the decision in *Ratten v. The Queen* [1972] A.C. 378, the maximum extent in English law of the res gestae exception to the hearsay rule was the admission in evidence of statements made during the commission of the actual crime or tort: *Reg. v. Bedingfield,* 14 Cox C.C. 341. Once the crime or tort was complete any subsequent statements were inadmissible. By the time that *Bedingfield* was decided in 1879 the accepted doctrine was that only words uttered at the time of the crime or tort were admissible. There is no case that runs counter to that proposition until the decision of the Privy Council in *Ratten v. The Queen* [1972] A.C. 378.

The rationale of any exception to the hearsay rule is that the victim realises that he is reaching a point of no return or, as the old cases put it, is contemplating an impending judgment before his Maker. In other words, it is the supposed psychological guarantee of the truth of the statement which is the criterion of its admission. Reported English cases that have followed *Ratten v. The Queen* [1972] A.C. 378 are *Reg. v. Nye* (1977) 66 Cr.App.R. 252 and *Reg. v. Turnbull* (1984) 80 Cr.App.R. 104.

If, contrary to the appellant's primary submission, the exception exists, how wide is it? It is limited to events making up the crime or tort. The criterion adumbrated in the Australian case of *Brown v. The King*, 17 C.L.R. 570, is adopted, namely, that for the statement of the

declarant to be admissible as part of the res gestae, it must be a statement uttered substantially contemporaneously with the attack itself. A mere narrative of events, however close in time to the event in question, is not sufficient. This is a clear doctrine understood by the legal profession and the layman alike. It follows that *Rex v. Foster,* 6 C. & P. 325; *O'Hara v. Central S.M.T. Co. Ltd.,* 1941 S.C. 363 and *Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle,* 64 C.L.R. 514 were wrongly decided, and that *Brown v. The King,* 17 C.L.R. 570, was rightly decided.

The law uses one particular measure in negativing spontaneity of utterance, namely, whether the words were spoken in contemplation of proceedings: see the *Adelaide* case, 64 C.L.R. 514, 530, and the *O'Hara* case, 1941 S.C. 363, 382. In the present case the statement made by the victim was to police officers some minutes after the attack.

As to the possibility of error, the evidence on the voire dire in the present case shows that the deceased may have had some animus against the defendant Andrews. The deceased's daughter had stated that both defendants had previously done damage to her father's flat. The above factors were such as should have excluded the statement in question. The risk of concoction and the risk of error are very relevant factors. Where the statement relates to identification the possibility of error is very strong and the observations of Lawton L.J. in *Reg. v. Nye,* 66 Cr.App.R. 252, are supported. In conclusion, it is conceded that the Irish case of *Reg. v. Lunny* (1854) 6 Cox C.C. 477, decided in the formative period of this branch of the law, was wrongly decided on the defendant's primary argument.

Michael Worsley Q.C. and *Godfrey Carey* for the Crown.

[Lord Bridge of Harwich. Their Lordships do not need to be persuaded of the res gestae exception to the hearsay rule. But they desire to hear argument on the limits of the exception and the criteria for its application].

There is an immense amount of learning on this subject, especially in the United States of America. There are decisions of the Supreme Court of the United States from the middle of the last century and of the courts of the various States of the Union from even before the American Civil War. It is to be remembered that the United States and the Commonwealth decisions grew out of the common law of England.

The reason for the coming into existence, and subsequent maintaining of, the rule against hearsay was the possible unreliability of such evidence due to: (a) the absence of an oath (or affirmation) which would have (i) brought about increased moral obligation to tell the truth, (ii) and, in default, given rise to liability to penalty for perjury, and (b) the absence of opportunity to cross-examine and thereby: (i) to test the veracity of the witness by the content of question and answer and by observation of his demeanour, (ii) to explore the possibility of innocent error, whether or not due to repetition, and, quaere (iii) to elicit further material.

Statements made by persons involved in or witnessing an exciting event, for example, an assault or an accident, so close to the event in point of time (although not necessarily exactly contemporaneously) and

in point of circumstance, as to exclude the possibility of concoction (to the advantage of the maker of the statement or another or to the disadvantage of another) in the very nature of the case removes, wholly or substantially, the objections to receiving evidence of such statements based on doubts as to its veracity. As to the quite separate and well-established exception to the rule against hearsay known as "dying declarations": see *Rex v. Woodcock* (1789) 1 Leach 500, 504, *per* Eyre C.B. Thus in principle there is no substantial distinction between the basis for that exception and the basis for the exception consisting of spontaneous statements, in that in each case the trial judge is satisfied that the *special* circumstances are such that the state of mind of the person whose statement is to be received in evidence was that he was desirous of telling the truth. It makes no difference that the reason why that state of mind exists is different in the one case from the other, that is, (i) the contemplation of approaching death; or (ii) the absence of opportunity to concoct. The indistinguishability of the basis of the two exceptions has been judicially recognised in the careful reasoning of Barrows J., giving judgment in an appeal in a murder case in the Supreme Judicial Court of Maine: *State of Maine v. Wagner* (1873) 61 Maine Rep. 178, 195, 197.

The principal *reason* for affording an opportunity to cross-examine a witness in unusual circumstances is the need to test his veracity. Further, the possibility of innocent error upon the part of the person whose statement is reported exists whether or not the maker of the statement to be relied upon is available for cross-examination. The possibility of error (on the part of the person reporting the statement) occasioned by repetition is one which can be tested by cross-examining the person repeating the statement. The circumstances indicating the likelihood of error or the lack of it, in each case, go to weight rather than to admissibility.

The fact that the person whose statement is to be received may not himself be a witness and thus available to provide testimony as to additional matter is no good reason in itself for refusing to admit his statement made in circumstances negativing concoction. If the person who made the statement is dead or not available to give evidence for some good reason, then such additional matter could not be elicited from him in any event. If that which he *has* stated is or may be incomplete, then that is a factor going to weight not to admissibility.

The rule now contended for by the Crown is as stated in *Ratten v. The Queen* [1972] A.C. 378, 391c: "hearsay evidence may be admitted [of] the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused." Such evidence is admitted on the footing that "the words said to have been used involve an assertion of the truth of some facts stated in them and that they have been so understood by the jury" (p. 388E).

Whether the qualification of that rule added by the Court of Appeal (Criminal Division) in *Reg. v. Nye,* 66 Cr.App.R. 252, 256, that the circumstances must be such as to satisfy the trial judge that there was no

A possibility of error by the declarant, may require reconsideration. That is because, there being the possibility of error in almost all human activity, that factor is a matter of weight for the jury and not of decision for the judge upon the issue of admissibility.

The rule against hearsay became crystallised as a rule of law from about 1670 onwards: see *Lutterell v. Reynell* (1670) 1 Mod.Rep. 282 and succeeding cases. The history is summarised in *Phipson on Evidence,* B 11th ed. (1970), section 648 and *Wigmore, Evidence in Trials at Common Law,* 2nd ed. (1923), vol. 2, section 1364, pp. 9 to 25.

At about the same time as that rule became established, an exception to it was recognised in such cases as the present. That is, spontaneous statements in circumstances negativing concoction: *Thompson v. Trevanion,* Skin. 402, and succeeding cases. Thus the rule against C hearsay is not an all-embracing absolute rule of law, but one to which there was an exception or modification virtually as old as the rule itself. The rule now contended for by the Crown is supported by an enormous body of case law in common law jurisdictions, for example, England, The United States of America, Canada, Australia: see *Wigmore, Evidence in Trials at Common Law,* 4th ed. (1976), vol. 6, pp. 191–247. Thus the rule now contended for by the Crown does not involve any D extension of the existing hearsay rule and so is not in conflict with the ruling of the majority of this House in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001, which was to the effect that it is now too late to add further exceptions to the rule against hearsay otherwise than by legislation. That exception is not to be confused with two further and quite separate rules: (a) recent complaints by the victims of sexual E assaults; (b) dying declarations. It is to be noted that the particular facts of some cases might come within both the rule now contended for by the Crown and one of these two rules.

As to recent complaints in sexual cases—a rule that goes right back to Bracton: (a) the origin of the rule lay in the ancient requirement that a woman lodging an appeal of rape had to show that she had raised a hue and cry. For its history, see *Phipson on Evidence,* 11th ed., para. F 356, and *Reg. v. Lillyman* [1896] 2 Q.B. 167. (b) The rule is that the complaint is not evidence of the truth of the facts recited but is admissible as evidence of the consistency of the complainant's conduct and thus goes to absence of consent. (c)(i) The rule does not require the spontaneity and absence of opportunity for concoction that is essential for the rule contended for by the Crown in this case. (ii) For example, G in a case of indecent assault upon a girl at 10 a.m., evidence that she made her way from the scene along populous public highways and found her way home and there waited for her mother to return at, say, 2 p.m. and thereupon told her of the assault, is admissible under the rule relating to recent complaints in sexual cases. However, it plainly would not be admissible as evidence of the truth of its contents under the rule now contended for by the Crown. That is because there would have H been ample *opportunity* for concoction due to the *absence of spontaneity.* (d)(i) That rule is itself an exception to the general rule that, at any rate in examination-in-chief, evidence cannot be given by a witness as to his own previous statements consistent with his evidence in the witness box,

that is, he cannot make evidence for himself or corroborate himself. (ii) that general rule has existed for a long time but is a reversal of the previous opposite rule which was asserted in, for example, *Lutterell v. Reynell,* 1 Mod.Rep. 282. As to dying declarations: (a) the foundation of that rule is the proposition that if a person believes that he is about to die and his soul pass on to judgment by the Almighty, the earthly motives he might otherwise have had for lying have been displaced by that consideration and that therefore that circumstance is at least of equal weight to the taking of an oath in court. (b) It follows from the reason for that rule that the spontaneity required under the rule now contended for by the Crown does not have to be shown in the case of a dying declaration, for example, if a man be grievously wounded but survives the attack upon him by hours or days and then, when he has lost hope of living, makes a dying declaration, that is admissible as evidence of the truth of its contents even though, in the hours or days between attack and declaration, he had the *opportunity* to concoct.

In some of the cases preceding *Ratten v. The Queen* [1972] A.C. 378, the rule now contended for by the Crown was not applied in favour of the Crown due to the lapse of time between the crime and the declaration: *Teper v. The Queen* [1952] A.C. 480 and *Rex v. Christie* [1914] A.C. 545. In such cases the non-application of the rule was thus due to the absence of merits upon the facts, so the origins and history of the rule did not receive that exhaustive consideration such as it received in the *Ratten* case [1972] A.C. 378. That may explain, inter alia, why there are to be found apparently conflicting dicta about cases such as *Reg. v. Bedingfield,* 14 Cox C.C. 341.

As to any argument that *Stobart v. Dryden* (1836) 1 M. & W. 615 overruled *Thompson v. Trevanion,* Skin. 402, it is not sustainable for *Thompson v. Trevanion* is nowhere mentioned in *Stobart v. Dryden.*

In support of the approach adopted in *Ratten v. The Queen* [1972] A.C. 378, *Wigmore on Evidence,* 4th ed., vol. 6, pp. 191, 197 is adopted. For a clear judicial exposition of the problems raised by the use of the words 'res gestae': see the judgment of Lockwood J. in *Keefe v. State* (1937) 72 P. (2d) 425, 427, referred to by Wigmore at pp. 192, 193. Wigmore shows by a wealth of authority that the exception contended for exists and it would seem that it appears shortly after the hearsay rule itself was established at the end of the 17th century, for the exception was recognised in *Thompson v. Trevanion,* Skin. 402.

It is proposed to cite a number of American and Commonwealth authorities which support the rule for which the Crown contends. Thus in *Insurance Co. v. Mosley* (1869) 75 U.S. 397 the United States Supreme Court followed *Thompson v. Trevanion,* Skin. 402 and *Rex v. Foster,* 6 C. & P. 325. The following are also relied upon: *State of Maine v. Wagner,* 61 Maine Rep. 178; *Dismuker v. State of Alabama* (1888) 3 South. Rep. 671; *Travelers' Insurance Co. v. Sheppard* (1890) 12 S.E. 18; *Green v. State of Indiana* (1900) 57 N.E. 637; *People v. del Vermo* (1908) 85 N.E. 690; *Roach v. Great Northern Railway Co.* (1916) 158 N.W. 232; *People v. de Simone* (1919) 121 N.E. 761; *Armborst v. Cincinnati Traction Co.* (1928) 25 F. (2d) 240; *Duncan v. Rhomberg* (1931) 236 N.W. 638; *Showalter v. West Pacific Railway Co.* (1940) 106

P. 2d 895. Of these authorities special mention may be made of *Travelers' Insurance Co. v. Sheppard,* 12 S.E. 18, 26, where Bleckley C.J. in the Supreme Court of Georgia succinctly stated the proposition for which the Crown contend, namely, "what the law altogether distrusts is not after-speech, but after-thought." *Green v. State of Indiana,* 57 N.E. 637, 638, a decision of the Supreme Court of Indiana, is a very good illustration of the principle for which the Crown contend and the dictum of Baker C.J. that "the admission of the declaration depends upon its being so connected in time and circumstances with the principal act that the assailed appears to be the spontaneous spokesman of the act, and not the deliberate utterer of an afterthought" is adopted. For an important statement of the relevant principle, see also *Showalter v. West Pacific Railway Co.,* 106 P. 2d 895.

For a comprehensive review of the American authorities: see especially *Wigmore,* 4th ed., vol. 6, pp. 222–224, 228, 230–232(d). The discussion of *Reg. v. Bedingfield,* 14 Cox C.C. 341, in *Wigmore,* 4th ed., vol. 6, pp. 233–234 is adopted. It supports the observations of Lord Wilberforce in *Ratten v. The Queen* [1972] A.C. 378. For very recent English authorities in which *Ratten v. The Queen* has been considered and applied: see *Reg. v. O'Shea* (unreported), 24 July 1986, and *Reg. v. Boyle* (unreported), 6 March 1986, both decisions of the Court of Appeal (Criminal Division).

It must be emphasised that this question of admissibility has nothing to do with the veracity of the victim but the nature of the occasion on which the words in question were uttered. The judge at the trial on the voire dire has to examine the facts carefully and be satisfied that the statement sought to be admitted was made at a time when the person in question was under the influence of the excitement of the occasion and had no time for concoction. If the House follows Holt C.J. in *Thompson v. Trevanion,* Skin. 402, there is no risk of the doctrine getting out of hand: see *Wigmore,* 4th ed., vol. 6, p. 196. The criterion is that the mind of the victim at the time of the utterance was under the control of a startling event.

To revert briefly to the American authorities, in *Ratten v. The Queen* [1972] A.C. 378, the judgment of the Board relied upon, inter alia, *People v. de Simone,* 121 N.E. 761. If that case is to be followed, then the other much stronger American authorities which were not cited in *Ratten* should also be followed. *The Schwalbe* (1859) Swab. 521 shows that the doctrine for which the Crown contends is not confined to the criminal law. Further it is relied upon by the American courts. This demonstrates that American law has not grown up independently from English law on this matter.

As to the Canadian authorities, *Reg. v. McMahon,* 18 Ont.Rep. 502 is distinguishable on its facts but it presupposes the principle for which the Crown contends. It is conceded that *Rex v. Leland* [1951] O.R. 12 is against the Crown. But *Jarvis v. London Street Railway Co.* (1919) 48 D.L.R. 61 shows that there is a strong line of Canadian authorities in favour of the Crown's principle. See in particular *Gilbert v. The King* (1907) 38 S.C.R. 284 where *Rex v. Foster,* 6 C. & P. 325, was approved

and the Crown's principle supported by 11 judges in the two appellate courts.

As regards *Reg. v. Parker* (1960) 45 Cr.App.R. 1, the present point was not considered. In that case there was no voire dire. But in *Holder v. The Queen* [1980] A.C. 115 the Judicial Committee of the Privy Council followed the second part of *Ratten v. The Queen* [1972] A.C. 378.

The authorities establish that Lord Wilberforce's judgment in the *Ratten* case correctly stated a principle in the wide terms there found which has existed for 200 years, albeit it has been forgotten from time to time.

In conclusion, as to the danger of a statement being concocted, it is for the trial judge to determine on the evidence whether the animus of the declarant against the accused is such as to throw such doubt on the spontaneity of the utterance of the declarant as to warrant its exclusion: see *People v. Marks* (1959) 160 N.E. 2d 26.

Sedley Q.C. in reply. The flood of decisions cited by *Wigmore,* 4th ed., vol. 6, is to show that judicial practice outruns judicial statements. It is, however, well known that in English law there is far less certainty on this issue than Professor Wigmore asserts. *Reg. v. Bedingfield,* 14 Cox C.C. 341 has stood for over a century and has been applied on many occasions. On the other hand, *Rex v. Foster,* 6 C. & P. 325, has been forgotten. The same applies to *Thompson v. Trevanion,* Skin. 402. It must be emphasised that the English courts have followed and applied *Reg. v. Bedingfield*: see, for example, *Reg. v. Goddard,* 15 Cox C.C. 7. Even after *Ratten v. The Queen* [1972] A.C. 378 was decided in the Privy Council, it was not built upon until *Reg. v. Turnbull,* 80 Cr.App.R. 104, in 1984, since when there have been some four cases. There is real doubt as to the ambit of the Crown's principle and of *Reg. v. Bedingfield,* 14 Cox C.C. 341, and of the doctrine of hearsay itself. [Reference was made to *Wigmore,* 4th ed., vol. 6, p. 198.]

If the courts are to go beyond *Bedingfield,* it will be difficult to decide on which side of the line a particular case will fall. As to the problems which arise on the Crown's principle, animus may come to the fore in the moment of shock and not necessarily retreat. Further, error is possible and is a factor which the trial judge must try to eradicate.

The dictum of Black J. in *Leahey v. Cass Ave. and F.G. Railway Co.* (1888) 10 S.W. 58, 60, that "The better reasoning is that the declaration, to be a part of the res gestae, need not be coincident in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause," which was relied on by the Crown, is too imprecise a guide.

On its facts, the present is a borderline case. There are real conceptual difficulties once one departs from the usual psychological concept of the admissibility of evidence under this exception to the hearsay rule. See the dictum of Mellish L.J. in *Sugden v. Lord St. Leonards* (1876) 1 P.D. 154, 250.

Their Lordships took time for consideration.

A 5 February. Lord Bridge of Harwich. My Lords, for the reasons given in the speech of my noble and learned friend Lord Ackner, with which I agree, I would dismiss this appeal.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it, and for the reasons which he gives, I B would dismiss the appeal.

Lord Griffiths. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it, and for the reasons which he gives I would dismiss the appeal.

C

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Ackner. I agree with it, and for the reasons he gives I would dismiss this appeal.

D Lord Ackner.
My Lords,

The facts

On 13 September 1983 Alexander Morrow, who lived at flat No. 3, Rouple House, London, was attacked and stabbed with two different knives and robbed. Within minutes of the attack, and bleeding profusely E from a deep stomach wound, he went downstairs to the flat below for assistance. The police and ambulance were immediately telephoned, and again within a matter of minutes the police arrived, shortly followed by the ambulance. Mr. Morrow had been mortally wounded. He was kept alive on a life-support machine but died two months after this attack. Both O'Neill and the appellant, Andrews, were charged with murder. F O'Neill pleaded guilty to manslaughter, which plea was accepted by the prosecution. The appellant pleaded not guilty and O'Neill was the prosecution's main witness at the appellant's trial. O'Neill lived in flat No. 5, on the floor above that of the deceased. He and the appellant had been out drinking that day and returned home in the evening about 8.30 p.m. to his, O'Neill's flat. The substance of his evidence was that as they were about to leave the flat a very short while later, the appellant G asked if O'Neill had any knives, and when O'Neill told him there were some in the kitchen, the appellant helped himself to a large bread knife and a small potato knife. He also took a blanket from O'Neill's daughter's cot. On the way out, the appellant stopped at the deceased's flat, put the blanket over his and O'Neill's head, handed O'Neill the small potato knife and tried to force the lock of the flat using the bread knife. He failed. He then knocked on the door and when the deceased H answered, the appellant shouldered the door open, lunging with the knife, and stabbing the deceased in his chest and stomach. As the deceased fell down the appellant said, "I am going to finish the old bastard off." O'Neill said he then dropped the potato knife, tried to

save the deceased but in the process was stabbed twice in the leg. The cot blanket by this stage had come off their heads. The appellant then ran into the room, came back with the deceased's stereo player, told O'Neill to get the deceased's money and O'Neill took about £4.

They then returned to O'Neill's flat and put the blanket back. They then left, taking with them the two knives and the stereo record player and went to the appellant's flat in Droitwich House. Subsequently, O'Neill was taken by ambulance to hospital to have his wounds dealt with.

The hearsay evidence

There were effectively two trials, the first in January 1985 before the Recorder of London. Mr. Michael Worsley who appeared for the prosecution, considered that there was an adequacy of evidence capable of corroborating that of O'Neill, the appellant's accomplice. Without going unnecessarily into detail, this consisted, inter alia, of the stolen stereo record player being found on the bed in the appellant's flat, his lies to the police about how he had come by it, evidence of the appellant being seen, after he returned to his flat, in possession of the two knives, the appellant's own admission of his disposal of those knives and forensic evidence with regard to blood stains on the appellant's clothing. However, in the event, the jury failed to agree.

On the retrial before the Common Serjeant, which began a week later, Mr. Worsley wished to strengthen the case of the prosecution and he accordingly sought the judge's ruling on the admissibility of the deceased's statement identifying his assailants and made in the following circumstances. According to the neighbours' agreed witness statements, the deceased was found on the landing on the floor below his flat between 8.35 p.m. and 8.45 p.m. This must have been within a very few minutes of the stabbing, bearing in mind O'Neill's evidence as to time when he had returned to his flat and the very nature of the stab wound in the deceased's stomach, from which blood was pouring. The 999 call made by the neighbour was at 8.43 p.m. and P.C. Worboys and P.C. Hanlon must have arrived a couple of minutes or so thereafter (P.C. Worboys stated in evidence that the ambulance arrived between 10 or 15 minutes after them and the uncontradicted evidence was that the ambulance arrived at 9.01 p.m.) P.C. Worboys' main preoccupation was in administering first aid, in particular in stopping blood pouring from the stab wound in the stomach. While he was so doing he asked the deceased how he had received his injuries. The deceased replied that he had been attacked by two men. He gave the names of his attackers, as being Peter O'Neill from flat 5, Rouple House, and the other, as a man he knew as Donald. He said he had gone to the door of his flat, opened the door and was attacked by these two men. P.C. Worboys noticed that P.C. Hanlon, who was making a note of this statement, had written down the name "Donavon." P.C. Worboys was convinced that the name was Donald and he told P.C. Hanlon that he was wrong. P.C. Hanlon

was not as close to the deceased as P.C. Worboys. In his evidence P.C. Worboys confirmed that the deceased had said that he had been attacked by two persons, one of whom he knew as O'Neill and a person, whom P.C. Hanlon thought the deceased had referred to as "Donavon." P.C. Hanlon said that he heard "Don" quite clearly but as he pronounced the rest of the word his voice "mellowed and he got quieter." He said he did not notice that the deceased had any accent. The evidence was that the deceased spoke with a Scottish accent.

Mr. Worsley sought to have the statement of the deceased admitted as evidence of the truth of the facts that he had asserted, namely that he had been attacked by both O'Neill and the appellant. Since evidence of this statement could only be given by a witness who had merely heard it, such evidence was clearly hearsay evidence. It was not being tendered as evidence limited to the fact that an assertion had been made, without reference to the truth of anything alleged in the assertion. The evidence merely of the fact that such an assertion was made would not have related to any issue in the trial and therefore would not have been admissible. Had, for example, the deceased's state of mind been in issue and had his exclamation been relevant to his state of mind, then evidence of *the fact* that such an assertion was made, would not have been hearsay evidence since it would have been tendered without reference to the truth of anything alleged in the assertion. Such evidence is often classified as "original" evidence.

The res gestae doctrine

Mr. Worsley based his submission that this hearsay evidence was admissible upon the so-called doctrine of "res gestae." He could not submit that the statement was a "dying declaration" since there was no evidence to suggest that at the time when the deceased made the statement (two months before his ultimate death), he was aware that he had been mortally injured. Mr. Worsley in support of his submission, both before the Common Serjeant, the Court of Appeal and in your Lordships' House relied essentially on a decision of the Privy Council, *Ratten v. The Queen* [1972] A.C. 378, an appeal from a conviction for murder by the Supreme Court of the State of Victoria in which the opinion of the Board was given by Lord Wilberforce. Mr. Worsley, for whose researches into this field of law I readily express my gratitude, invited your Lordships' attention to American, Canadian and Australian authorities in order to demonstrate their consistency with that decision and to support his contention, which is the real issue in this appeal viz. that your Lordships should accept the analysis, reasoning and advice tendered by the Privy Council as being good English law.

I do not think it is necessary to burden this speech by travelling again over all the ground, which, if I may say so respectfully, was so admirably covered by Lord Wilberforce in his judgment. Before turning to the decision in *Ratten's* case, it is convenient at this stage to quote from *Cross on Evidence*, 6th ed. (1985), p. 585:

> "Before Lord Wilberforce's important review of the authorities in *Ratten v. The Queen*, the law concerning the admissibility of

statements under this exception to the hearsay rule [the res gestae doctrine] was in danger of becoming emmeshed in conceptualism of the worst type. Great stress was placed on the need for contemporaneity of the statement with the event, but, what was far more serious, much attention was devoted to the question whether the words could be said to form part of the transaction or event with all the attendant insoluble problems of when the transaction or event began and ended."

Ratten v. The Queen [1972] A.C. 378

The appellant was charged with the murder of his wife by shooting her with a shotgun. He accepted that he had shot her, but his defence was that the gun had gone off accidentally, whilst he was cleaning it. There was evidence that the deceased was alive and behaving normally at 1.12 p.m. and less that 10 minutes later she had been shot. To rebut that defence, the prosecution called evidence from a telephone operator as to a telephone call which she had received at 1.15 p.m. from the deceased's home. She said the call came from a female who sounded hysterical and who said "get me the police, please—," gave her address, but before a connection could be made to the police station, the caller hung up. The appellant objected to that evidence on the ground that it was hearsay and did not come within any of the recognised exceptions to the rule against the admission of such evidence. The Judicial Committee held that the telephone operator's evidence had been rightly received. They concluded that the evidence was not hearsay, but was admissible as evidence of facts relevant to the following issues. First, as rebutting the defendant's statement that his call for the ambulance after he had shot his wife was the only call that went out of the house between 1.12 and 1.20, by which time his wife was dead. Secondly, that the telephonist's evidence that the caller was a woman speaking in an hysterical voice was capable of relating to the state of mind of the deceased and was material from which the jury were entitled to infer that Mrs. Ratten was suffering from anxiety or fear of an existing or impending emergency. Lord Wilberforce said, at p. 387:

"The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', i.e., as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 965, 970: 'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is

admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.'"

Lord Wilberforce then proceeded to deal with the appellant's submission, on the assumption that the words were hearsay in that they involved an assertion of the truth of some facts stated in them and that they may have been so understood by the jury. He said, at pp. 388–390:

"The expression 'res gestae,' like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. In the context of the law of evidence it may be used in at least three different ways: 1. When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening. Thus in *O'Leary v. The King* (1946) 73 C.L.R. 566 evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J. said at p. 577: 'Without evidence of what, during that time, was done by those men who took any significant part in the matter and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.'

"2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, i.e., are the relevant facts or part of them.

"3. A hearsay statement is made either by the victim of an attack or by a bystander—indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae. A classical instance of this is the much debated case of *Reg. v. Bedingfield* (1879) 14 Cox C.C. 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason, why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used and because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been victims of assault or accident. The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person (as he could not at the time when earlier reported cases were decided) can give his own account if different. There is no such difference in kind or substance between evidence

of what was said and evidence of what was done (for example between evidence of what the victim said as to an attack and evidence that he (or she) was seen in a terrified state or was heard to shriek) as to require a total rejection of one and admission of the other.

"The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and the differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression 'res gestae' may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings."

Lord Wilberforce then reviewed a number of cases, in England, in Scotland, in Australia and America and concluded, at p. 391, that those authorities:

"show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

Applying that principle to the facts of the *Ratten* appeal [1972] A.C. 378, there was in their Lordships' judgment ample evidence of the close and intimate connection between the statement ascribed to the deceased and the shooting which occurred very shortly afterwards. Lord Wilberforce commented, at p. 391:

"The way in which the statement came to be made (in a call for the police) and the tone of voice used, showed intrinsically that the

A statement was being forced from the deceased by an overwhelming pressure of contemporary event. It carried its own stamp of spontaneity and this was endorsed by the proved time sequence and the proved proximity of the deceased to the accused with his gun."

Thus, on the assumption that there was an element of hearsay in the words used, the Privy Council concluded that they had been properly B admitted.

In *Reg. v. Blastland* [1986] A.C. 41, 58, my noble and learned friend Lord Bridge of Harwich, regarded the authority of the *Ratten* case [1972] A.C. 378 as being of the highest persuasive authority. It was followed and applied in the instant case by the Common Serjeant and by the Court of Appeal (Criminal Division) and accordingly the appellant's C appeal against his conviction for manslaughter was dismissed. It had previously been applied in *Reg. v. Nye* (1978) 66 Cr.App.R. 252, by the Court of Appeal where a victim of a criminal assault, which had occurred within a few yards of a police station, in a statement to police officers made within minutes of the assault, identified the defendant as the man who had hit him in the face. Lawton L.J. in giving the judgment of the court put, as he described it, a gloss upon Lord D Wilberforce's test by adding as an additional factor to be taken into consideration "was there any real possibility of error?" I will return to this particular point later. In *Reg. v. Turnbull* (1984) 80 Cr.App.R. 104 the Court of Appeal again applied the *Ratten* approach, where a man who had been mortally wounded staggered into the bar of a public house and in answer to questions put to him in the bar and in the E ambulance on the way to hospital he was understood to say that "Ronnie Tommo" had done it. He died half-an-hour later in hospital. The victim had a Scottish accent and had consumed a great quantity of alcohol and the name "Ronnie Tommo" was said to constitute his attempt to name the appellant. There have been two further decisions of the Court of Appeal this year which have followed *Ratten's* case. *Reg. v. Boyle* (unreported) decided on 6 March 1986, involved the theft of a F grandfather clock from an old lady to whose home the appellant had obtained access by a false representation. When he took away the clock she came out of the house with a piece of paper in her hand and when asked by a neighbour, "what is happening?" she said "I am coming for his address." This statement was admitted to support the victim's account that the removal of the clock was against her will and to G negative the defence that it was being taken away by the defendant with her consent, to have it repaired, I, for myself, would doubt whether this evidence was hearsay evidence. A clear issue in the case was the state of mind of the victim in relation to the removal of her clock. Her statement in the circumstances, as the car drove off, was evidence from which the jury could infer that she was not consenting to the clock being taken away. *Reg. v. O'Shea* (unreported) decided on 24 July 1986, is a clearer H case. The appellant was charged with burglary and manslaughter. The prosecution case against the appellant was that he went to a second floor flat and while he was battering down the door, the occupier of the flat, who was 79 years of age, attempted to escape through the window,

slipped and fell some 20 feet and sustained bruising to his heart, which resulted in his death a week later. The statement made by the deceased to two passers-by an hour or so later, when they found him lying where he had fallen, that he had tried to get out of his flat because he was frightened that two robbers who were trying to break down his door would kill him and that he had therefore jumped from the window to escape, was admitted, as was a similar statement which he made to two police officers less than 20 minutes later.

Mr. Sedley for the appellant submitted, first that there is no such exception to the rule against the admission of hearsay evidence as that said to be covered by the res gestae doctrine. Having regard to the authorities there is no substance in this proposition. Secondly, he submitted that a hearsay statement cannot be admitted under the doctrine if made after the criminal act or acts charged have ceased. He contended that the hearsay statement must form part of the criminal act for which the accused is being tried. He relied strongly upon *Reg. v. Bedingfield*, 14 Cox C.C. 341. In that case the accused was charged with murder. The defence was suicide. The accused was seen to enter a house and a minute or two later the victim rushed out of the house with her throat cut and said to her aunt "See what Harry has done." This exclamation was not admitted by Cockburn C.J. at pp. 342–343 because "it was something stated by her after it was all over, whatever it was, and after the act was completed." Mr. Sedley submits that the decision in *Ratten's* case involved an extension of the existing hearsay rule and so was in conflict with the ruling of the majority in your Lordships' House in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 that it is now too late to add a further exception to the rule against hearsay otherwise than by legislation. This submission is not assisted by the fact that both Lord Reid and Lord Hodson, who were party to the majority decision in the *Myers* case, were also members of the Board in the *Ratten* case [1972] A.C. 378.

I do not accept that the principles identified by Lord Wilberforce involved any extension to the exception to the hearsay rule. Lord Wilberforce clarified the basis of the res gestae exception and isolated the matters of which the trial judge, by preliminary ruling, must satisfy himself before admitting the statement. I respectfully accept the accuracy and the value of this clarification. Thus it must, of course, follow that *Reg. v. Bedingfield*, 14 Cox C.C. 341 would not be so decided today. Indeed, there could, as Lord Wilberforce observed, hardly be a case where the words uttered carried more clearly the mark of spontaneity and intense involvement.

The trial judge

My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the res gestae doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as "hearsay evidence?"

1. The primary question which the judge must ask himself is—can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error.

Croom-Johnson L.J., in giving the judgment of the Court of Appeal (Criminal Division) dismissing the appeal, stated, in my respectful view quite correctly, that the Common Serjeant had directed himself impeccably in his approach to the evidence that he had heard. It is perhaps helpful to set out verbatim how the judge stated his conclusions:

> "I am satisfied that soon after receiving very serious stab wounds the deceased went downstairs for help unassisted and received some assistance. He was able to talk for a few minutes before he became unconscious. I am satisfied on the evidence—and not only the primary evidence but the inference of fact to which I am irresistibly driven—that the deceased only sustained the injuries a few minutes

before the police arrived and subsequently, of course, the ambulance took him to hospital. Even if the period were longer than a few minutes, I am satisfied that there was no possibility in the circumstances of any concoction or fabrication of identification. I think that the injuries which the deceased sustained were of such a nature that it would drive out of his mind any possibility of him being activated by malice and I cannot overlook as far as the identification was concerned, he was right over Mr. O'Neill who was a former co-defendant with the accused."

Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal. Of course, having ruled the statement admissible the judge must, as the Common Serjeant most certainly did, make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the juries' attention must be invited to those matters.

My Lords, the doctrine of res gestae applies to civil as well as criminal proceedings. There is, however, special legislation as to the admissibility of hearsay evidence in civil proceedings. I wholly accept that the doctrine admits the hearsay statements, not only where the declarant is dead or otherwise not available but when he is called as a witness. Whatever may be the position in civil proceedings, I would, however, strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place all the relevant material facts before the court, so as to ensure that justice is done.

My Lords, I would accordingly dismiss this appeal.

Appeal dismissed.

Solicitors: Fisher, Meredith & Partners; Crown Prosecution Service.

J. A. G.

[HOUSE OF LORDS]

REGINA . . . . . APPELLANT

AND

MAGINNIS . . . . . RESPONDENT

1987 Jan. 21, 22; March 5

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Mackay of Clashfern, Lord Oliver of Aylmerton and Lord Goff of Chieveley

Crime—Drugs—"Supply"—Person in physical control of drug—Intention to return to owner by transfer of physical control—Whether defence to charge of intent to supply—Misuse of Drugs Act 1971 (c. 38), ss. 4(1)(b), 5(3)

The defendant pleaded guilty to a count charging possession of a package containing 227 grammes of cannabis resin contrary to section 5(2) of the Misuse of Drugs Act 1971[1] but not guilty to a count charging possession of the cannabis with intent to supply contrary to section 5(3). His evidence was that the package, which had been found under the driver's seat of his car, had been left there the previous evening by a friend. He would not name the friend but said: "I expected him to come round and pick it up." The judge ruled that the intention of returning the package to the man who had left it in the car made the defendant guilty of the offence under section 5(3) of the Act of 1971. Thereupon the defendant changed his plea and was convicted. The Court of Appeal allowed his appeal against conviction on the ground that the judge's ruling had been wrong in law.

On appeal by the Crown:—

Held, allowing the appeal (Lord Goff of Chieveley dissenting), that in its ordinary natural meaning "supply" meant furnishing or providing a person with something that that person wanted or required for that person's purposes; that, while "supply" connoted more than a mere transfer of physical control, it was not necessary that the furnishing or provision should be made out of the supplier's own resources; that, on the assumed facts, the defendant, if he had handed the drugs back to his friend, would have done so in order to enable the friend to apply them for his own purposes; and that, accordingly, he would have supplied the drugs to his friend in contravention of section 4(1) of the Misuse of Drugs Act 1971 and had therefore been guilty of the offence under section 5(3) (post, pp. 309A–B, D–F, 313F—314A).

Donnelly v. H.M. Advocate, 1985 S.L.T. 243 approved.

Reg. v. Delgado [1984] 1 W.L.R. 89, C.A. and *Reg. v. Dempsey* (1985) 82 Cr.App.R. 291, C.A. considered.

Decision of the Court of Appeal (Criminal Division) [1986] Q.B. 618; [1986] 2 W.L.R. 767; [1986] 2 All E.R. 110 reversed.

The following cases are referred to in their Lordships' opinions:

Donnelly v. H.M. Advocate, 1985 S.L.T. 243

Reg. v. Delgado [1984] 1 W.L.R. 89; [1984] 1 All E.R. 449, C.A.

[1] Misuse of Drugs Act 1971, ss. 4(1)(*b*), 5(3): see post, p. 308E–G.

Reg. v. Dempsey (1985) 82 Cr.App.R. 291; The Times, 22 November 1985, C.A.

The following additional cases were cited in argument:

Britt v. Buckinghamshire County Council [1964] 1 Q.B. 77; [1963] 2 W.L.R. 722; [1963] 2 All E.R. 175, C.A.

Customs and Excise Commissioners v. Oliver [1980] 1 All E.R. 353

Holmes v. Chief Constable Merseyside Police [1976] Crim.L.R. 125, D.C.

Jackson v. Hall [1980] A.C. 854; [1980] 2 W.L.R. 118; [1980] 1 All E.R. 177, H.L.(E.)

Reg. v. Buckley (1979) 69 Cr.App.R. 371, C.A.

Reg. v. Downes [1984] Crim.L.R. 552, C.A.

Reg. v. Greenfield (Evan) (Note) (1983) 78 Cr.App.R. 179; [1983] Crim.L.R. 397, C.A.

Reg. v. Harris (Janet) [1968] 1 W.L.R. 769; [1968] 2 All E.R. 49, C.A.

Reg. v. Jones (Colin) [1974] R.T.R. 117, C.A.

Reg. v. Mills [1963] 1 Q.B. 522; [1963] 2 W.L.R. 137; [1963] 1 All E.R. 202, C.C.A.

Appeal from the Court of Appeal (Criminal Division).

This was an appeal by the Crown by leave of the Court of Appeal (Criminal Division) (Parker L.J., French and Mann JJ.) [1986] Q.B. 618 from their decision allowing an appeal by the defendant, Patrick Terrance Maginnis, against his conviction at Inner London Crown Court (Judge Pullinger and a jury) on 20 June 1985 of possessing a controlled drug, namely 227 grammes of cannabis resin, with intent to supply it to another, contrary to section 5(3) of the Misuse of Drugs Act 1971.

The facts are set out in the opinion of Lord Keith of Kinkel.

Michael Kalisher Q.C. and *Michael Birnbaum* for the Crown. The Act of 1971 is a statute of frequent application, and certainty as to the meaning of the word "supply" is important to those concerned in the administration of justice. Those persons who are in possession of substantial quantities of drugs, which are eventually destined to be supplied to consumers, should be liable to the higher penalties provided for by section 5(3) of the Act rather than section 5(2). Deliberate transfers of controlled drugs between persons ought to be punishable as offences; the trial judge was correct in stating that the mischief that the legislation aimed at and was intended to prevent was the free movement of controlled drugs. If it were a defence to a charge under section 5(3) of the Act to be "looking after" the drug (of which there might be a substantial quantity) for another, drug dealers would be encouraged untruthfully to say so. Such assertions are very difficult to disprove. The observations of Mann J. do not provide a complete answer to the problem.

The Crown makes the following contentions. (a) *Reg. v. Delgado* [1984] 1 W.L.R. 89 was correctly decided, and a supply of a controlled drug takes place if there is a transfer of physical control of the drug from one person to another. An intention to supply a controlled drug is simply an intention to transfer physical control of the drug to another. (b) If *Reg. v. Dempsey* (1985) 82 Cr.App.R. 291 was correctly decided, a sufficient benefit is conferred by the return of the drug from another

A who has had temporary possession of it to constitute a supply. Accordingly, a person who has possession of a controlled drug with the intention of returning it to another has possession of the drug with intent to supply it to that other.

On (a), there is no requirement, express or to be implied, in the Act that the person "supplied" with the drug should be a consumer or fall B into or be excluded from any particular category. A "supply" to a middleman or the owner of a drug is as much a supply as a supply to the ultimate consumer. See in particular *Reg. v. Greenfield (Evan) (Note)* (1983) 78 Cr.App.R. 179 and the commentary thereon in [1983] Crim.L.R. 397. By section 37(1) of the Act of 1971 "supplying" includes "distributing." Therefore, the word "supply" in the Act should not be limited to the definition of that word in the *Shorter Oxford English* C *Dictionary*: *Holmes v. Chief Constable Merseyside Police* [1976] Crim.L.R. 125; *Reg. v. Buckley* (1979) 69 Cr.App.R. 371. Some absurd examples would otherwise arise: see *Customs and Excise Commissioners v. Oliver* [1980] 1 All E.R. 353.

The facts in *Reg v. Dempsey* were "very unusual," and "on any view, this is a case not likely to be repeated" (82 Cr.App.R. 291, 293). In D those circumstances, the case should be limited to its own particular facts and not be of general application. The word "supply" has been considered where it appears in other statutes: see in particular *Reg. v. Mills* [1963] 1 Q.B. 522, 527 (Lord Parker C.J.); *Reg. v. Jones (Colin)* [1974] R.T.R. 117 and *Customs and Excise Commissioners v. Oliver, per* Griffiths J., at p. 355.

On (b), the recipient obtains physical control of the drug so that he E has it immediately available for consumption or sale or such other use as he may wish to put it to. He acquires physical control when he would be unable to enforce through the courts any claim for the return of the drug to him. The analogy drawn by Mann J. of a cloakroom attendant is not appropriate.

Reg. v. Delgado was rightly decided; *Reg. v. Dempsey* was wrongly F decided and should be overruled. Alternatively, if *Reg. v. Dempsey* was rightly decided, and there is in the word "supply" the concept of benefit or something equivalent, then in any event in the *Reg. v. Delgado* situation and the present there is a benefit. A person who possesses a drug with the intention of returning it to another person from whom he receives it intends to confer a sufficient benefit on that other person so G as to intend to supply the drug to him.

"Supply" simply means transfer from one person to another. It should be given its ordinary, everyday meaning, and this should be a wide meaning. Handing the drug over to the police would be a supply. Handing the drug back to the dealer is making it available for consumers. That is something that ought to be prevented. It is done with intent to put the drug back into circulation. One must look at the transaction as a H whole. The bailee performs a substantial service for the bailor. An addict for whom a drug has been prescribed who hands it to his wife to look after would be guilty to supplying it. So would she be when handing it back. The use of "includes" in section 37(1) ("'supplying'

includes distributing") does not indicate a restriction of meaning but is for the avoidance of doubt. [Reference was made to sections 25 and 31.]

Birnbaum following. There would be no need for certain of the provisions within the Regulations of 1973 and 1985 (in particular regulations 8, 9 and 14 of the Regulations of 1973 and regulations 6, 8, 9 and 14 of the Regulations of 1985) if Parliament had intended the word "supply" to be limited to cases in which the transfer of physical control was for the benefit of the recipient of the article. The following points are made. (i) The Regulations are an exception to the generally accepted principle, because they are not just ancillary to the Act. The Act together with the Regulations was intended by Parliament to be a composite instrument defining offences and circumscribing the lawful use of drugs. It is, therefore, legitimate to look at the Regulations not to determine the meaning of "supply" but to assist in arriving at a definition of it. (ii) It would be strange if one could not look at the Regulations, which lay down the exceptions to the general principle of criminal liability. The Act prohibits certain acts, with a penalty of up to 14 years' imprisonment, and then confers power to make exceptions on the Secretary of State. That is exceptional. (iii) Under section 31(3), the Secretary of State consults with the Advisory Council before making regulations. So, whereas ordinary regulations are complementary to a statute, these Regulations are essential to the scheme envisaged by Parliament. The situation in *Britt v. Buckinghamshire County Council* [1964] 1 Q.B. 77 was directly analogous to the present. Without the Regulations, much of the purpose of the Act would be frustrated.

If it is legitimate to look at the Regulations, it is clear that the use of the word "supply" therein is consistent with the view that "supply" entails simply a transfer of physical possession. [Reference was made to *Jackson v. Hall* [1980] A.C. 854.] In both the Regulations and the Act "supply" must be construed in its ordinary and natural meaning. The fact that it is used in that sense is borne out by some of the regulations, which confirm its meaning in the Act: see e.g., "deliver" in regulation 14 of the Regulations of 1985. There is no ambiguity if one reads the Act and the Regulations together.

Keith Stones and *Douglas Taylor* for the defendant. A person who takes temporary, accidental possession of drugs belonging to a known supplier does not himself supply those drugs when he returns them to the supplier. For the purposes of section 5(3) of the Act of 1971 an intent to supply means an intent on the part of the person in possession to supply, not the intent of the actual supplier whose drugs they are.

Reg. v. Greenfield, 78 Cr.App.R. 179, and *Reg. v. Dempsey,* 82 Cr.App.R. 291, were correctly decided. *Reg. v. Delgado* [1984] 1 W.L.R. 89 was rightly disapproved by the Court of Appeal in the present case; the wide-ranging definition of "supply" given by Skinner J. in *Reg. v. Delgado,* at p. 92E-F, is not the definition intended by Parliament in section 5(3) of the Act of 1971. The more limited definition in *Reg. v. Greenfield* and *Reg. v. Dempsey* is the correct one.

In *Reg. v. Greenfield* it was accepted by first the trial judge and then the Court of Appeal that handing back a drug to a supplier would not be a supply. That decision was correct; further, the defendant seeks to

rely on the actual decision in that case, on which point he did not argue or rely below. The friend's intent to supply could never have infected the defendant with an intent to supply. The preferred definition of "supply" is that in the *Shorter Oxford English Dictionary* (1952 ed.): "To fulfil, satisfy (a need or want) by furnishing what is wanted. To furnish, provide, afford (something needed, desired or used). . . ." Supply is an act designed to benefit the recipient, and the analogy of the cloakroom attendant is a persuasive one.

Summarising there is no supply when a bailee, whether voluntary or involuntary, returns the goods to a bailor. There is no supply under the Act of 1971 when the only discernible benefit to the bailor is the simple resumption of possession of his goods when the bailee, involuntary or otherwise, returns them. The words of the Act are plain: "with intent to supply" means the intent on the part of the person who possesses to supply and not the intent of someone other than he who is in possession of the drugs.

The Crown says that "supply" means transfer of physical control: simply handing over. The defendant's contention is that the transfer must be for the benefit of the person to whom the drug is handed over. Handing back one's own goods is not a supply. If drugs are left in a taxi and the driver hands them back to the customer, that is not supply: see *Reg. v. Downes* [1984] Crim.L.R. 552.

Taylor following. The word "supply" is consistent throughout the Act. There is much ambivalence in the Regulations; they are confused, and it would be unsafe to rely on them.

Kalisher Q.C. in reply. The Crown supports the wide definition given to "supply" in *Reg. v. Delgado:* see *Donnelly v. H.M. Advocate*, 1985 S.L.T. 243. If it is to have a narrower meaning, what should it be? The Crown does not support the idea of "benefit"; it prefers Lord Goff of Chieveley's phrase "for the recipient's own purposes."

Their Lordships took time for consideration.

5 March. Lord Keith of Kinkel. My Lords, the respondent ("the defendant") was charged upon indictment with three counts alleging contraventions of the Misuse of Drugs Act 1971. The first count charged him with possessing a controlled drug with intent to supply it unlawfully to another, contrary to section 5(3) of the Act, and the second count, which was alternative to the first and related to the same package of drugs, charged him with unlawful possession of it contrary to section 5(2) of the Act. The third count charged unlawful possession of a different smaller quantity of drugs. The present appeal is not concerned with that count and it need not be further mentioned. At the trial, before Judge Pullinger and a jury at Inner London Crown Court, the defendant pleaded not guilty to the first count, but guilty to the second. The plea of guilty to the second count was not accepted by the prosecution, and the trial proceeded on the first count. Evidence was led by the prosecution to the effect that a package containing 227 grammes of cannabis resin, a controlled drug, having a street value of about £500, was found under the driver's seat of the defendant's car after he had been arrested in connection with an alleged assault. The defendant

stated to police officers that he did not deal in drugs and that the package had been left in the car on the previous evening by a friend. He declined to name the friend and said "I expected him to come round and pick it up." At the close of the prosecution case counsel for the defendant asked the judge to direct the jury that if they accepted that his intention had been merely to return the package of drugs to the person who had left it in the car that would not have been an intent to supply it to another in contravention of section 4(1)(*b*) of the Act of 1971, and that he should therefore be acquitted on count one. The judge ruled that the intention to return the package to the person who had left it in the car did constitute the requisite intent for conviction, and the defendant thereupon changed his plea on the first count to one of guilty. He was sentenced to 12 months' imprisonment on that count.

The defendant appealed, and on 20 December 1985 the Court of Appeal (Criminal Division) (Parker L.J., French and Mann JJ.) allowed the appeal and quashed the conviction. On the application of counsel for the prosecution, they certified that a point of law of general public importance was involved in their decision, and later granted leave to appeal to this House. The certified question is as follows:

> "1. Whether a person intends to supply a controlled drug if: (a) he intends to transfer physical control of the drug to another; or (b) he intends to transfer physical control of the drug to another for the benefit of the other. 2. If (b) above is correct, whether such benefit is constituted by the return of physical control of the drug to a bailor by a bailee."

Section 5(3) of the Act of 1971 provides:

> "Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 4(1) of this Act"

and section 4(1):

> "Subject to any regulations made under section 7 of this Act for the time being in force, it shall not be lawful for a person—(*a*) to produce a controlled drug; or (*b*) to supply or offer to supply a controlled drug to another."

No question arises as to the possible application of sections 28 or 5(4) or of any regulations made under section 7.

The issue in the appeal is concerned with the meaning properly to be attributed to the word "supply" in section 4(1) and in section 5(3). This is to be ascertained in the usual way by reference to the ordinary natural meaning of the word together with any assistance which may be afforded by the context. Counsel for the Crown sought also to derive some assistance from the Misuse of Drugs Regulations 1973 (S.I. 1973 No. 797), made under the powers to that effect contained in the Act of 1971, which came into force at the same time as the principal provisions of the Act. This is not, however, one of those exceptional cases where a guide to the construction of a statute may be obtained from regulations made

under it, and the regulations in question are not, in my opinion, admissible for the purpose sought to be made of them. The same applies, a fortiori, to the similarly entitled Regulations of 1985 (S.I. 1985 No. 2066), to which reference was also made.

The word "supply," in its ordinary natural meaning, conveys the idea of furnishing or providing to another something which is wanted or required in order to meet the wants or requirements of that other. It connotes more than the mere transfer of physical control of some chattel or object from one person to another. No one would ordinarily say that to hand over something to a mere custodier was to supply him with it. The additional concept is that of enabling the recipient to apply the thing handed over to purposes for which he desires or has a duty to apply it. In my opinion it is not a necessary element in the conception of supply that the provision should be made out of the personal resources of the person who does the supplying. Thus if an employee draws from his employer's store materials or equipment which he requires for purposes of his work, it involves no straining of language to say that the storekeeper supplies him with those materials or that equipment, notwithstanding that they do not form part of the storekeeper's own resources and that he is merely the custodier of them. I think the same is true if it is the owner of the business who is drawing from his own storekeeper tools or materials which form part of his own resources. The storekeeper can be said to be supplying him with what he needs. If a trafficker in controlled drugs sets up a store of these in the custody of a friend whom he thinks unlikely to attract the suspicions of the police, and later draws on the store for the purposes of his trade, or for his own use, the custodier is in my opinion rightly to be regarded as supplying him with drugs. On the assumed facts of the present case (they were never tested before the jury), the defendant had been made custodier of the drugs by his unnamed friend, who, having regard to the quantity of the drugs, may legitimately be inferred to have been a trader. If on a later occasion the defendant had handed the drugs back to his friend, he would have done so in order to enable the friend to apply the drugs for the friend's own purposes. He would accordingly, in my opinion, have supplied the drugs to his friend in contravention of section 4(1). It follows that in so far as he was in possession of the drugs with the intention of handing them back to the friend when asked for by the latter, he was in possession with intent to supply the drugs to another in contravention of section 4(1) and was thus guilty under section 5(3).

The reason why the Court of Appeal (Criminal Division) gave leave to appeal in this case was that they believed that they perceived a conflict between two earlier decisions of that court. These two decisions were *Reg. v. Delgado* [1984] 1 W.L.R. 89 and *Reg. v. Dempsey* (1985) 82 Cr.App.R. 291. In *Reg. v. Delgado* the accused had been a passenger in a minicab which was stopped by police because it was not displaying a tax disc. He ran away leaving in the car a holdall containing 6.31 kilogrammes of cannabis. At his trial on a charge of contravening section 5(3) he gave evidence that two acquaintances had told him that they had stolen the cannabis and had nowhere to keep it. They asked him to look after it for a couple of hours and he agreed to do so. He

was on his way to deliver it back to them when he was arrested. The judge ruled that returning the cannabis to those who had given it to him would be an act of supplying, and the accused thereupon pleaded guilty to the charge. Upon his appeal the Court of Appeal (Criminal Division), consisting of Lord Lane C.J., Skinner and McCowan JJ., held that the ruling of the trial judge was correct and dismissed the appeal. Skinner J., delivering the judgment of the Court of Appeal, said, at p. 92:

> "Thus we are driven back to considering the word 'supply' in its context. The judge himself relied upon the dictionary definition, which is a fairly wide one. This court has been referred to the *Shorter Oxford English Dictionary*, which gives a large number of definitions of the word 'supply,' but they have a common feature, viz.: that in the word 'supply' is inherent the furnishing or providing of something which is wanted. In the judgment of this court, the word 'supply' in section 5(3) of the Act of 1971 covers a similarly wide range of transactions. A feature common to all of those transactions is a transfer of physical control of a drug from one person to another. In our judgment questions of the transfer of ownership or legal possession of those drugs are irrelevant to the issue whether or not there was intent to supply. In the present case on his own evidence the appellant had possession of a substantial quantity of cannabis. His intention was to transfer control of it to his two friends at an agreed time and place. In those circumstances it seems to us that the judge was entirely right in his ruling, and that therefore the argument put forward by counsel for the appellant has no foundation."

In *Reg. v. Dempsey* the first accused, Michael, was a registered drug addict who had lawfully obtained from a medical practitioner ampoules of a controlled drug Physeptone. His account was that, while in the street accompanied by the second accused, Maureen, he gave her some of the ampoules to look after while he went into a public lavatory to inject himself from another ampoule. This was observed by police officers who arrested both accused. Michael was charged with supply of a controlled drug to Maureen under section 4(3)(*a*) of the Act of 1971 and Maureen with possession under section 5(2). The trial judge ruled that assuming Michael's account was true he had no defence to the charge of supply, and he thereupon changed his plea to guilty. On his appeal to the Court of Appeal (Criminal Division) that court, consisting of Lord Lane C.J., Boreham and McCowan JJ., held that the ruling of the trial judge was incorrect and quashed the conviction. Lord Lane C.J., giving the judgment of the court, said, at pp. 293–294:

> "Michael Dempsey was charged under section 4(3)(*a*) of the Misuse of Drugs Act 1971, which makes it an offence for any person to supply a controlled drug to another. The question in his case is whether by handing the ampoules to Maureen to hold for him temporarily, he can be said to have supplied the ampoules to her. The word 'supply' is defined in the *Shorter Oxford English Dictionary* as follows: '. . . To fulfil, satisfy (a need or want) by furnishing what is wanted. To furnish, provide, afford (something needed,

A desired or used). . . .' Those are the two definitions which seemed to be relevant to the particular circumstances. It is an act, so it seems, which is designed to benefit the recipient. It does not seem to us that it is apt to describe the deposit of an article with another person for safe keeping, as was the case here. The example was canvassed in argument of a person who hands his coat to a cloakroom attendant for safe keeping during the show in a theatre B or cinema. It could scarcely be said that the person handing the coat supplies it to the cloakroom attendant. Nor do we think it makes any difference that the cloakroom attendant wishes in one sense to get the coat, thinking that he may get a tip at the end of the evening. That is not the sort of wish or need which is envisaged by the definition of the offence. That sort of transfer is a transfer C for the benefit of the transferor rather than the transferee. In our judgment therefore the recorder was in error in ruling as he did. He should have left it to the jury to decide whether or not this transfer to Maureen of the controlled drug Physeptone was so that she could use the drug for her own purposes, for example to hand on to someone else or to use upon her own body, in which case there would have been a supply, or may simply have been for safe D keeping and for return to Michael, who was lawfully entitled to the drug, it having been prescribed for him, in which case there was not. We have been referred to a number of decisions, particularly the decisions in *Reg. v. Delgado* [1984] 1 W.L.R. 89; *Reg. v. Harris (Janet)* [1968] 1 W.L.R. 769 and *Reg. v. Mills* [1963] 1 Q.B. 522. We do not think those decisions assist us in the interpretation of the E word 'supply.' If there is any ambiguity in the word, it must be resolved in favour of the defendant. That is clear from the passage to which we have been referred in *Maxwell on Interpretation of Statutes*, 12th ed. (1969), p. 239. There is no need for us to read that. We do not think there is an ambiguity. But as I say, if there is, the principle set out in *Maxwell* applies, namely that the ambiguity must be resolved in favour of the defendant."

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In the present case Mann J., giving the judgment of the court, said of these two decisions [1986] Q.B. 618, 623–624:

"We find it impossible to reconcile the meaning put upon the word 'supply' in *Reg. v. Delgado* [1984] 1 W.L.R. 89 with the meaning put upon that word in *Reg. v. Dempsey*, The Times, 22 November G 1985. The decision in *Reg. v. Delgado* is that the word is satisfied if there is a transfer of physical control of the drug in question. However, in *Reg. v. Dempsey* there was a transfer of physical control, yet the conviction was quashed. The cases cannot be composed on the basis that *Reg. v. Delgado* concerned section 5(3) of the Act of 1971, whereas *Reg. v. Dempsey* concerned section 4(3)(*a*). Each offence is drawn in terms of supply in contravention H of section 4(1). We are faced with two decisions of this court which conflict. In that circumstance we are bound to decide which of them to follow: see *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718, 729 and *Reg. v. Gould* [1968] 2 Q.B. 65. In our judgment, the

meaning put upon the word 'supply' in *Reg. v. Dempsey* is to be preferred. With respect to the members of the court in *Reg. v. Delgado* who thought otherwise, we cannot think that the word 'supply' as a matter of ordinary language is apt to mean merely transfer of physical control. We agree with the view of the court in *Reg. v. Dempsey*, that for there to be a supply there must be a transfer of physical control which is for the benefit of the recipient of the article. Mr. Forrester, for the Crown, accepted that this was the correct formulation but argued that the transferee obtains a benefit when he receives back an article which he has placed in the custody of another. The only discernible benefit is the resumption of actual possession. We do not accept that this is sufficient to constitute the return of an article an act of supply. In ordinary language the cloakroom attendant, the left luggage officer, the warehouseman and the shoe mender do not 'supply' to their customers the articles which those customers have left with them. In each case the lawyer would perceive the translation of the right to possession into actual possession, but even so the user of ordinary language does not perceive a 'supply.' To hold that A, in possession of a controlled drug, does not supply B when he hands the substance to B for safe keeping whilst he makes a telephone call from a telephone box, and is therefore not guilty of possession with intent to supply when he decides to hand the substance to B, but that when B returns the substance to A he supplies A and is thus guilty of possession with intent to supply from the moment when he accepts the substance into his custody whilst A telephones, is in our judgment unacceptable. It would be to attribute to Parliament an intention which we can only regard as bordering on the farcical. If B, when found holding the drug, were to be asked: 'Do you intend to supply it to anyone?', he would surely reply: 'No, it belongs to A. I'm holding it for him while he telephones in that call-box over there.' We cannot give the word 'supply' a meaning that would render this appellant guilty of possession with intent to supply. Accordingly, there was a wrong direction on a question of law, and for that reason we allowed the appeal against conviction on count 1."

In my opinion, there is a clear distinction between the decision in *Reg. v. Delgado* and that in *Reg. v. Dempsey*. In *Reg. v. Delgado* a custodier was found to have the necesary intent to supply because his intention was to hand back controlled drugs to the persons who had deposited them with him so as to enable those persons to apply the drugs to their own purposes, and thus put them back into circulation. In *Reg. v. Dempsey* there was a mere placing in temporary custody, and no intention of enabling the custodier to use the drugs for her own purposes. Maureen did not want the drugs for any purpose of her own. One who deposits controlled drugs of which he is in unlawful possession with a temporary custodier has no legal right to require the drugs to be handed back to him. Indeed it is the duty of the custodier not to hand them back but to destroy them or to deliver them to a police officer so

that they may be destroyed. The custodier in choosing to return the drugs to the depositor does something which he is not only not obliged to do, but which he has a duty not to do. Any analogy with bailment is false in a situation where the depositor has no right to ownership which the law would recognise and certainly none to immediate possession.

It is worth noting that, in a decision which was not cited in the Court of Appeal, the High Court of Justiciary in Scotland accepted a construction of section 5(3) which is in line with *Reg. v. Delgado*, of which it expressed approval. That decision is *Donnelly v. H.M. Advocate*, 1985 S.L.T. 243. The appellant had claimed that a quantity of controlled drugs, of which she had been found in possession, had been placed in her custody by a man called Colin Stewart. In the course of the opinion of the court it was said, at p. 244:

> "if the appellant intended to part with all or some of the drugs in her possession to Colin Stewart, even for his own use, she intended to supply Colin Stewart and it matters not whether his intention was to use them himself or to supply others."

It is, I think, a misinterpretation of the grounds of judgment in *Reg. v. Delgado* to regard them as holding that a mere transfer of physical control of a drug from one person to another may constitute supply within the meaning of the subsection. If, however, this was the intention of the judgment, it is not, in my view, entirely correct. For the reasons I have earlier expressed, it is necessary that the transfer be for the purposes of the transferee, and the decision in *Donnelly v. H.M. Advocate* accords with that view. The desirability of these statutory provisions, applicable as they are both in England and in Scotland, being interpreted alike in both jurisdictions needs no emphasis.

My Lords, for these reasons I would allow the appeal. The certified question is not in all respects apt to raise the true issue in the case. I would amend it so as to read:

> "Whether a person in unlawful possession of a controlled drug which has been deposited with him for safe keeping has the intent to supply that drug to another if his intention is to return the drug to the person who deposited it with him"

and answer the question as so amended in the affirmative.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would allow the appeal, and answer the certified question, amended in the manner which he proposes, in the affirmative.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree that the certified question should be amended in the manner indicated by my noble and learned friend and that the appeal should be allowed and the amended question answered in the affirmative for the reasons which he has given.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree that the certified question should be amended in the manner indicated by my noble and learned friend and that the appeal should be allowed and the amended question answered in the affirmative for the reasons which he has given.

LORD GOFF OF CHIEVELEY. My Lords, we are concerned in this case with the meaning of the word "supply" as used in the expression "with intent to supply it to another" in section 5(3) of the Misuse of Drugs Act 1971; though, since there is no reason to suppose that the word "supply" in section 5(3) is intended to have any different meaning from the same word in section 4(1)(*b*) of the Act, which makes it unlawful "to supply or offer to supply a controlled drug to another," we are really concerned with the meaning of the word in both subsections.

The primary rule of construction is that we should attribute to words their natural and ordinary meaning, unless the context otherwise requires. So what is the natural and ordinary meaning of the word "supply?" I hesitate to attempt a definition, especially as the word under consideration is not always very precisely used; but to me the word, as used in relation to goods, connotes the idea of making goods available to another from resources other than those of the recipient. This approach is, I consider, consistent with some of the dictionary meanings in the *Shorter Oxford English Dictionary*, for example, "the act of making up a deficiency, or of fulfilling a want or demand," and "the act of supplying something needed." It is also, I believe, consistent with the ordinary use of the word in everyday speech. So to deliver goods to a buyer or his agent under a contract of sale would obviously be to supply goods to that person, and indeed would perhaps provide the typical example of a supply of goods; though I can see no reason why the delivery of goods by way of gift should not also amount to a supply of goods.

But we are concerned in the present case with a deposit of goods; and I do not feel able to say that either the delivery of goods by a depositor to a depositee, or the redelivery of goods by a depositee to a depositor, can sensibly be described as an act of supplying goods to another. I certainly cannot conceive of myself using the word "supply" in this context in ordinary speech. I ask myself: why should I not do so? I answer: I would not describe the delivery by the depositor to the depositee as a supply of goods, because the goods are not being made available to him but are rather being entrusted to him; and I would not describe the redelivery by the depositee to the depositor as a supply of goods, because the goods are simply being returned to him, rather than being made available to him from resources other than his own.

The context does not, as I see it, require any departure from the natural and ordinary meaning of the word. Moreover, the interpretation which I would give to the word, which I derive from my understanding of the use of the word "supply" in ordinary speech, is consistent with the conclusion of the Court of Appeal in the present case. I must confess that, in a case where I am looking for the ordinary meaning of

an ordinary word like "supply," I am much influenced by the fact that the three members of the Court of Appeal, having searched like myself for the ordinary meaning of the word, and having considered the earlier authorities, have reached the same conclusion as I myself have reached. In delivering the judgment of the court, Mann J. said [1986] Q.B. 618, 624:

> "In ordinary language the cloakroom attendant, the left luggage officer, the warehouseman and the shoe mender do not 'supply' to their customers the articles which those customers have left with them."

I entirely agree. I cannot imagine ordinary people using the word "supply" to describe any of those four transactions. They would rather talk about redelivering or returning the goods to the customer or, more colloquially, handing them back to him. It follows that, in respectful agreement with my noble and learned friend, Lord Keith of Kinkel, I cannot accept the submission of the Crown that a mere transfer of possession of itself necessarily constitutes a supply. But I find myself, with all respect, unable to agree with my noble and learned friend that it is a sufficient qualification to characterise a transfer of possession as a supply that it should be made in order to meet the wants or requirements of the recipient, such expression being understood to include circumstances where the want or requirement of the recipient is simply to get his own goods back again. Moreover, in the case where a man deposits his own goods with a storeman, and draws on those goods from time to time, I do not think that it would be an appropriate use of the word "supply" to describe the storeman as supplying the depositor when he releases part of the goods to him. Even if the word "supply" were to be used in such a context, I would regard it as a loose or aberrant use of the word which should not be regarded as providing any foundation for the proposition that the word can be appropriately used, or is normally used, in every case where a depositee returns the goods to a depositor.

There remains, however, a problem. We are concerned in the present case with controlled drugs; and, in cases which come before the courts, an agreement by a depositee of controlled drugs to return them to the depositor will ordinarily be unlawful. In such circumstances the depositor will have no enforceable right that the drugs should be restored to him. Can it therefore be said that, in those circumstances, since the depositee is not bound to return the drugs to the depositor, he can, if he does so, be described as *supplying* them to the depositor? I do not think so. The point is for me too legalistic. Let us forget about controlled drugs for the moment; and let us suppose that, owing to some technical rule of law, a contract of deposit of goods is unenforceable. But the depositee is an honourable man, and returns the goods to the man who deposited them with him. Nobody would, I think, describe him in ordinary language as supplying the goods to the depositor, simply because he was not legally bound to return them. The fact is that the goods came from the depositor's own resources; and all the depositee was doing was returning them to him. True it is that, in the case of controlled drugs with which we are concerned, not only has the depositor

no enforceable right to recover them from the depositee, but the depositee has a duty to hand them over to the authorities. But I cannot, for my part, see that this means that, if the depositee does not comply with his duty and instead hands the drugs back to the depositor, he is "supplying" them to the depositor. I cannot imagine myself so describing his act; I would say that the depositor had, in breach of his duty, returned the controlled drugs to the depositor. To use the word "supply" in such a case would not, in my opinion, accord with the natural and ordinary meaning of that word.

I wish to add that the conclusion which I have reached as to the meaning of the word "supply" in section 5(3) of the Act of 1971 seems to me to accord with the purpose of that subsection. The subsection creates an offence which is evidently directed at those who are "pushing" controlled drugs. However, a person with whom controlled drugs are deposited is not, in my opinion, necessarily involved in "pushing" them. He may be so involved; but if so he can then be charged and convicted as an accessory. At all events, to impose a meaning on the word "supply" in the subsection which would have the effect that every depositee of controlled drugs would be in possession of them with intent to supply them to another could, in my opinion, result in persons being convicted of that offence when they should only be convicted of the offence of having been in unlawful possession of them. It is not to be forgotten that, even for the latter offence, it is open to the court to impose, in an appropriate case, a substantial penalty of up to five years' imprisonment. If, however, contrary to my understanding, it were to be thought that any depositee of controlled drugs should be held to be in possession of them with intent to supply another when his intention was simply to return them to the depositor, then the appropriate course, in my opinion, would be for Parliament to enlarge the definition of "supplying" in section 37 of the Act to include such a case.

In my opinion, therefore, the Court of Appeal reached the right conclusion for the right reasons. I also find myself to be in agreement with the conclusion of the Court of Appeal in *Reg. v. Dempsey*, 82 Cr.App.R. 291; but I would, for my part, hold that *Reg. v. Delgado* [1984] 1 W.L.R. 89 (and the Scottish case of *Donnelly v. H.M. Advocate*, 1985 S.L.T. 243, in which *Reg. v. Delgado* was, very understandably, followed) were, with all respect, wrongly decided.

For the reasons I have given, I would dismiss the appeal and answer the question (as amended) in the negative.

Appeal allowed.
Conviction restored.
Certified question answered in affirmative as amended.

Solicitors: Solicitor, Metropolitan Police; Huntley Millard & Co.

M. G.

[HOUSE OF LORDS]

In re D. (A MINOR)

1986 March 19
Oct. 8;
Dec. 4

Dillon, Stephen Brown and Woolf L.JJ.

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Griffiths, Lord Mackay of Clashfern and Lord Goff of Chieveley

Children and Young Persons—Care proceedings—Relevant considerations—Child born with drug dependency due to mother's drug abuse—Child taken from mother at birth—Juvenile court finding that child's health being impaired or proper development being prevented—Whether mother's conduct during pregnancy relevant—Whether justices entitled to make care order—Children and Young Persons Act 1969 (c. 54), s. 1(2)(a)

Section 1(2) of the Children and Young Persons Act 1969 provides:

> "If the [juvenile] court before which a child or young person is brought . . . is of opinion that any of the following conditions is satisfied with respect to him, that is to say—(*a*) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated; . . . and also that he is in need of care or control which he is unlikely to receive unless the court makes an order under this section in respect of him, then . . . the court may if it thinks fit make such an order."

A mother who was a drug addict continued to take drugs during her pregnancy knowing that they could affect the foetus. The father was also a drug addict. The child was born prematurely and suffering from drug dependency. After a period in hospital she was taken into the care of the local authority and was never in the care of her parents, who remained drug addicts. The local authority commenced proceedings seeking a care order pursuant to section 1 of the Act of 1969 on the grounds that the child's proper development was being avoidably prevented or her health was being avoidably impaired. It was not in dispute that the child was in need of care and control that she was unlikely to receive unless a care order was made. The juvenile court made the care order, and the child, by her guardian ad litem, appealed. The Divisional Court of the Family Division held, allowing the appeal, that events occurring before the child's birth were irrelevant for the purposes of section 1(2)(*a*) of the Act and, since the cause of the child's condition related to the mother's conduct during pregnancy, the statutory requirements for the making of the care order had not been fulfilled. The Court of Appeal allowed an appeal by the local authority.

On appeal by the child:—

Held, dismissing the appeal, that the expression "is being" in section 1(2)(*a*) of the Children and Young Persons Act 1969 with regard to a child's development, health or treatment related to a continuing situation or state of affairs; that the point of time at which the court had to consider whether a continuing situation of one or other of the three kinds described in section

1(2)(*a*) existed was the moment immediately before the process of protection was first put into motion; that in considering whether any such continuing situation existed the court had to look at the situation both as it was at that point of time and as it had been in the past, how far back it should look depending on the facts of the case; that it should also look to the future but only in conjunction with the present and the past in the sense of asking whether, if the process of protection had not been put in motion, the situation would have been likely to continue; and that, giving section 1(2)(*a*) a broad and liberal construction in furtherance of the legislative purpose of protecting the child, the juvenile court had been entitled, in considering whether the child's development was being avoidably prevented or her health was being avoidably impaired, to look back at the time before she had been born when those situations had been caused and the possibility of their avoidance had existed and to conclude that a care order should be made (post, pp. 335C, 345D–F, 346C–D, E–G, 347G–H, 348C–E, 349A–C, 350A–B, D–H, 351G–H).

Essex County Council v. T.L.R. and K.B.R. (1978) 143 J.P. 309, D.C.; *F. v. Suffolk County Council* (1981) 2 F.L.R. 208 and *M. v. Westminster City Council* [1985] F.L.R. 325, D.C. considered.

Per Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Griffiths and Lord Mackay of Clashfern. The three situations in section 1(2)(*a*) are to be regarded as alternatives, though in many cases any two, or all three, may co-exist (post, pp. 335C, 345B, 349A–C).

Per Lord Griffiths, Lord Mackay of Clashfern and Lord Goff of Chieveley. The mere fact of a past avoidable prevention of proper development or impairment of health is not sufficient to fulfil the condition of "is being," even if there are symptoms or effects that persist or manifest themselves later. There has to be a continuum in existence at the relevant time (post, pp. 349A–C, G—350A, 351A–C).

Decision of the Court of Appeal, post, p. 323C; [1986] 3 W.L.R. 85 affirmed.

The following cases are referred to in their Lordships' opinions

A. v. Liverpool City Council [1982] A.C. 363; [1981] 2 W.L.R. 948; [1981] 2 All E.R. 385, H.L.(E.)

Essex County Council v. T.L.R. and K.B.R. (1978) 143 J.P. 309; 9 Fam. Law 15, D.C.

F. v. Suffolk County Council (1981) 2 F.L.R. 208; 79 L.G.R. 554

M. v. Westminster City Council [1985] F.L.R. 325, D.C.

W. (A Minor) (Wardship: Jurisdiction), In re [1985] A.C. 791; [1985] 2 W.L.R. 892; [1985] 2 All E.R. 301, H.L.(E.)

The following additional case was cited in argument in the House of Lords:

A.-R. v. Avon County Council [1985] Fam. 150; [1985] 3 W.L.R. 311; [1985] 2 All E.R. 981, D.C.

The following cases are referred to in the judgments of the Court of Appeal:

A. v. Liverpool City Council [1982] A.C. 363; [1981] 2 W.L.R. 948; [1981] 2 All E.R. 385, H.L.(E.)

M. v. Westminster City Council [1985] F.L.R. 325, D.C.
W. (A Minor) (Wardship: Jurisdiction), In re [1985] A.C. 791; [1985] 2 W.L.R. 892; [1985] 2 All E.R. 301, H.L.(E.)

The following additional cases were cited in argument in the Court of Appeal:

F. v. Suffolk County Council (1981) 2 F.L.R. 208; 79 L.G.R. 554
W. v. Nottinghamshire County Council, The Times, 16 November 1985, C.A.

Appeal from the Divisional Court of the Family Division.

By notice given on 25 April 1985 the local authority, Berkshire County Council, commenced proceedings seeking a care order pursuant to section 1 of the Children and Young Persons Act 1969 in respect of a female child born on 12 March 1985. On 13 May 1985 a guardian ad litem was appointed to represent the child at the proceedings. On 1 August 1985 the juvenile court sitting at Reading made the care order. By notice dated 12 November 1985 the child by her guardian ad litem appealed by way of case stated, the questions for the opinion of the High Court being

> "(1) Is it wrong in law for the juvenile court to find that the condition under section 1(2)(*a*) of the Act of 1969 is satisfied in circumstances where the child has never been in the care of either parent or out of the care of responsible agencies? (2) Is the condition in section 1(2)(*a*) of the Act of 1969 satisfied in respect of a child when the evidence of the child's proper development being avoidably impaired or neglected or its health being avoidably impaired or neglected or its being ill-treated relates to when the child was en ventre sa mère? (3) On the facts found could the juvenile court properly find that the proper development of the child was being avoidably prevented or neglected or her health was being avoidably impaired or neglected or she was being ill-treated? (4) In considering section 1(2)(*a*) of the Act of 1969 should the juvenile court have considered the availability of wardship proceedings and/or proceedings under the Child Care Act 1980 and/or any other powers and procedures available to the local authority?"

On 22 January 1986 Judge Monier Williams sitting as a High Court judge in the Family Division ordered that the parents be joined as respondents to the appeal. On 4 February 1986 the Divisional Court of the Family Division (Hollings and Waite JJ.) allowed the appeal and discharged the care order.

By notice of appeal dated 10 February 1986 the local authority appealed on the grounds that the Divisional Court was wrong in law to hold (1) that no reasonable bench of justices could have found the primary condition of section 1(2)(*a*) of the Act of 1969 was satisfied and ought to have found on the facts that the condition was satisfied and that since it was conceded that the child was in need of care and control, the care order was properly made by the justices; (2) that the requirements of section 1(2)(*a*) of the Act of 1969 could not be satisfied

in circumstances where the child since birth had never been in the care of either parent or out of the care of responsible agencies; (3) that the primary condition of section 1(2)(*a*) of the Act of 1969 was not satisfied because the only evidence of the child's development being avoidably prevented or neglected or her health being avoidably impaired or neglected or of her being ill-treated related to the period when she was a child en ventre sa mère; (4) that the primary condition of section 1(2)(*a*) was satisfied only if there was evidence relating to a child since birth, and evidence relating to a child en ventre sa mère was by itself insufficient to satisfy the condition; (5) that the true meaning of "child" within the context of section 1 of the Act of 1969 did not include a child en ventre sa mère; (6) that the primary condition of section 1(2)(*a*) of the Act of 1969 could not be established and a care order made in circumstances where the particular harm suffered by the child in the immediate past was not capable of being repeated in precisely the same way; and (7) that the Divisional Court failed to take into account sufficiently or at all the child's medical condition at birth and the continued addiction to drugs of both parents when considering whether there was evidence upon which the primary condition of section 1(2)(*a*) of the Act of 1969 was satisfied.

The facts are stated in the judgment of Stephen Brown L.J.

Nicholas Medawar Q.C. and *Barbara Slomnicka* for the local authority. Section 1 of the Children and Young Persons Act 1969 requires two conditions to be satisfied before a care order can be made. The primary condition is any of the conditions set out in section 1(2) of the Act and only that contained in section 1(2)(*a*) is relevant to this appeal. The secondary condition is that the child is in need of care and control and there is no issue as to that. Therefore, in essence the question for the Court of Appeal is whether the primary condition could be and was satisfied on the facts found by the justices.

There is nothing in section 1(2)(*a*) of the Act which limits the evidence to that which has occurred since birth and it follows that the evidence of what occurred during pregnancy can be and is appropriate when a living child is being affected by what then occurred.

Whereas the juvenile court must be satisfied that the proper development and/or health of the child "is being" affected in one or other of the ways specified, there is nothing in the subsection which limits the cause to something then continuing. The fact that the conduct which is the cause of the effect cannot be repeated is irrelevant.

Although the power given by section 1 of the Act might only be exercised in relation to a living child, the Divisional Court correctly accepted that what happened to the child while yet unborn was relevant and ought to be considered, but failed to appreciate that if at the relevant time after birth the child's proper development and/or health "is being" affected in one of the ways specified, then the primary condition is made out whether or not the conduct, the cause of the effect, occurred before birth only or both before and after birth.

Therefore even though the whole of the mother's conduct (other than her continued abuse of drugs) vis-à-vis the child related to the

A period before birth, that is sufficient to bring the matter within section 1(2)(*a*) of the Act.

In any event, the mother's continued abuse of drugs was further evidence upon which the justices could be satisfied that the child's proper development was being avoidably prevented or neglected by the mother after the birth of the child. Between the date of the child's birth and the date of the first interim care order the mother had the parental B rights and duties in relation to the child exclusively and during that period she was avoidably preventing or neglecting the child's proper development in that the proper development of a child, physically, mentally and emotionally, would benefit from the care and breast feeding of a fit mother.

The mother had the option to stop taking drugs either during C pregnancy or on birth and she did not. The mother had in fact put herself in a position after the child's birth of making herself incapable of looking after it. Therefore the important bonding process with the mother was denied to the child.

The proper development of a child is a continuing process: see *F. v. Suffolk County Council* (1981) 2 F.L.R. 208 and *M. v. Westminster City Council* [1985] F.L.R. 325. Therefore the situation is properly to be D viewed as one continuing during pregnancy and since birth and admits of no artificial division into what happened prior to birth and since birth. Such distinction is unreal and ought not to be adopted.

"Child" does not simply mean a living child. The Dictionary gives foetus as the first meaning of "child." Therefore the justices could consider a child in the womb.

E *James Townend Q.C.* and *Christopher Critchlow* for the child. There was no evidence upon which the justices could find that the condition stated in section 1(2)(*a*) of the Children and Young Persons Act 1969 was satisfied. Despite the alternatives given, section 1(2)(*a*) expresses a single condition and the rules of duplicity do not apply. On its natural and ordinary meaning section 1(2)(*a*) refers only to events presently in existence.

F The meaning of the subsection was considered in *F. v. Suffolk County Council* (1981) 2 F.L.R. 208 and in *M. v. Westminster City Council* [1985] F.L.R. 325.

In *F. v. Suffolk County Council* McNeill J. said at p. 213 that since the present tense was used, what the court had to look at was the present conduct and its effect on the development of the child in the G past, at the present time or at any rate in the foreseeable future. In the present case the child had not been in the care of the parents since birth and that distinguished it from both the cases cited above.

In any event, at the time of the juvenile court hearing, four and a half months after the child's birth, there was no evidence of conduct on the part of the parents which was then happening to prevent the proper development or impair the health of the child. It was a fact that the H parents were registered drug addicts and continued to take drugs. The taking of drugs by the mother during pregnancy had caused the child's ill-health at birth and that promoted the care proceedings. But that particular conduct could not be repeated.

Whether the continued use or abuse of drugs by the parents amounted to conduct which satisfied the condition in section 1(2)(*a*) of the Act was speculative on the facts. The justices made no finding of fact on it.

The mother's drug abuse harmed the child in the womb. But that was history and was not the present situation. It could not be repeated and was not a continuing set of circumstances. Drug abuse could amount to a continuing set of circumstances but there was no evidence upon which that fact alone could satisfy the condition of section 1(2)(*a*) of the Act.

Looking at the situation when the proceedings started in April 1985 when the child was 6 weeks old, as opposed to the situation at the hearing on 25 July 1985, the condition was not satisfied since the child was in hospital and had been for six weeks since birth, and no drugs which could cause harm were going into the child's bloodstream. Therefore it could not be said on 25 April 1985 that its development "is being avoidably prevented." Once born, any avoidable neglect, impairment of health or ill-treatment was terminated since the only evidence of that related to when the child was en ventre sa mère.

Section 70 of the Act defines a "child" as "a person under the age of 14." Therefore a child is a being capable of a separate existence, an individual "persona." There cannot be care proceedings before its birth.

Section 1(2)(*a*) is not intended for use in respect of situations where the child has never been in the care of its parents since birth and the only evidence which could satisfy the subsection relates to when the child was a foetus.

This child was never in the care of its mother and therefore there had never been a test as to the care the mother could give to the child. The court must find proved that the child's proper development is being prevented by an act of the mother, but nothing the mother had done since the child's birth did that because the child was in the care of the local authority. It is impossible within the usual meaning of section 1(2)(*a*) of the Act to show that there had been ill-treatment or to show that the child's health was being "impaired" since it was born. The condition was present at birth and even though it was caused by the mother's drug taking before the birth, that is not relevant. The condition was not avoidable in the light of the whole history of the child. The child's health was not "impaired" at any stage after its birth and the mother's conduct during the child's life had not impaired its health. The child's health was impaired before birth.

If on the facts of the case a local authority, constable or authorised person could bring care proceedings pursuant to section 1(2)(*a*) of the Act, then the result would be that as soon as any mother who was a registered drug addict gave birth, the child could immediately be made the subject of care proceedings. If that be correct, it is for Parliament to make it clear beyond argument, especially in view of the restricted jurisdiction of the courts as a result of *A. v. Liverpool City Council* [1982] A.C. 363 and *In re W. (A Minor) (Wardship: Jurisdiction)* [1985] A.C. 791. Reference was also made to *W. v. Nottinghamshire County Council*, The Times, 16 November 1985.

A The appropriate procedure in the present case would be for the wardship jurisdiction of the court to be invoked.

Paul W. Reid for the parents.The submissions made on behalf of the guardian ad litem are adopted on behalf of the parents. The present case does not fall properly within section 1(2)(*a*) of the Children and Young Persons Act 1969 which must be narrowly construed. It is therefore important that the local authority should not be allowed to B invoke the statutory procedure and obtain a care order since it would interfere with the parents' rights to a greater degree than wardship proceedings would. The correct procedure in the present case would be to invoke the wardship jurisdiction of the court.

Medawar Q.C. replied.

C

Stephen Brown L.J. delivered the first judgment. This is an appeal from a decision of the Divisional Court of the Family Division of 4 February 1986. On that occasion the Divisional Court allowed an appeal by way of case stated from a decision of the Reading justices on 1 August 1985 whereby they made a care order in respect of a little girl in favour of the Berkshire County Council.

D The facts giving rise to these proceedings are sad but may be shortly stated. They concern a little girl who was born prematurely on 12 March 1985. She was born to a mother who was addicted to heroin or a substitute and, as a result, she was born in a condition where she herself was addicted to that drug and was suffering serious withdrawal symptoms. She was taken to a special care baby unit at the Royal Berkshire E Hospital, her health having deteriorated after her birth. She spent some six weeks in hospital and, in the interim, the local authority, the Berkshire County Council, placed the child on the abuse register. They called a case conference to consider the circumstances of this little baby and they decided to seek a care order from the juvenile court under the provisions of the Children and Young Persons Act 1969.

Those proceedings were commenced on 25 April and subsequently F successive care orders were made. It was arranged that the child should be separately represented by a guardian ad litem, who was appointed from a panel kept by the juvenile court. On 19 May 1985 the little girl was discharged from intensive care at the hospital to foster parents.

It is part of the chronology of events that the mother, who was unmarried at the time of the birth, married the father on 21 June 1985. G The Reading Juvenile Court commenced the hearing of the application by the local authority for a care order on 23 July 1985 and that hearing continued until it was completed on 1 August 1985 when the juvenile court made a care order in favour of the local authority.

The guardian ad litem appealed by way of case stated from the decision of the justices to the Divisional Court of the Family Division. The Divisional Court, as I have indicated, allowed that appeal and the H local authority, the first respondent in the proceedings before the Divisional Court, is the appellant before this court.

The facts found by the justices and stated in their case were as follows:

"(a) the child . . . was born to [the mother] . . . on 12 March 1985 at the Royal Berkshire Hospital, Reading; (b) at the time of her birth the child was suffering from symptoms caused by withdrawal from narcotics; (c) the mother had been a registered drug addict since 1982 and had been taking drugs for approximately 10 years; (d) the mother continued to take drugs, both by oral means and by injection, from the time when she knew that she was pregnant to the time when the child was born; (e) during the pregnancy the mother took drugs in excess of those which were prescribed for her by a registered medical practitioner; (f) the mother knew that by taking drugs whilst pregnant she could be causing damage to her child; (g) the child was kept in intensive care at hospital for several weeks immediately following the birth. A place of safety order was obtained by Berkshire social services on 23 April 1985 and successive interim care orders were in force from the 13 May 1985 to the date of hearing; (h) the child had not been in the care or control of the mother or the father . . . since her birth; (i) the medical condition in which the child was born was a direct result of deliberate and excessive taking of drugs by the mother during pregnancy; (j) the mother, and the father too, continued to be addicted to drugs and remained so on the final day of the hearing of this case."

The justices accepted that the particular circumstances which gave rise to the physical condition of the baby could not recur after the child had been born, but in paragraph 7(b) of the case they stated:

"However, we took the view that a child's development is a continuing process which encompasses the past and the present and we considered that events in the past life of this child, even during the time when it was a foetus in the womb, were relevant. For this reason we considered we were entitled to have regard to the mother's abuse of her own bodily health during pregnancy when deciding whether the condition in section 1(2)(*a*) of the Children and Young Persons Act 1969 was proved in respect of the child born of that pregnancy. We were satisfied that this child's proper development was being avoidably prevented or neglected or her health was being avoidably impaired or neglected or she was being ill-treated. In so deciding we accepted that we should not look at the future development of the child. We further concluded that this child was in need of care or control which she was unlikely to receive unless an order was made and we made a care order to the respondent in respect of the child."

The appeal to the Divisional Court raised the question of the construction and application of section 1(2) of the Children and Young Persons Act 1969. Section 1 provides:

"(1) Any local authority, constable or authorised person who reasonably believes that there are grounds for making an order under this section in respect of a child or young person may, subject to section 2(3) and (8) of this Act, bring him before a juvenile court. (2) If the court before which a child or young person is

A brought under this section is of opinion that any of the following conditions is satisfied with respect to him, that is to say—(*a*) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated . . . and also that he is in need of care or control which he is unlikely to receive unless the court makes an order under this section in respect of him, then, subject to the following provisions B of this section and sections 2 and 3 of this Act, the court may if it thinks fit make such an order."

The submissions made to the Divisional Court of the Family Division, which they accepted and upheld, concerned the application and construction of section 1(2)(*a*). The submission which received approval C was that, in this particular case, the only evidence before the justices as to the cause of the condition of the child related to events which had taken place before its birth; that there had been no opportunity for the mother to care for the child since the birth and accordingly no conduct on her part which could be said to have avoidably impaired the health or prevented the proper development of the child. Accordingly, applying the strict wording of section 1(2)(*a*) in its present tense, the condition D was not satisfied which is the primary condition which enables a court to proceed to make a care order.

It is not in dispute, nor was it in dispute before the Divisional Court, that the child is in need of care or control. Submissions were made to the effect that this was a case in which the court should consider wardship proceedings as being the appropriate procedure. The Divisional E Court came to the conclusion that the submissions made on behalf of the guardian ad litem and the mother, who was given leave to intervene before the Divisional Court, were made out and, accordingly, allowed the appeal.

Before this court Mr. Medawar for the local authority submits that the Divisional Court fell into error. In his submission, it looked too F narrowly at the application of section 1(2)(*a*) and in effect overlooked the complete findings of the justices, including the continuing addiction of the parents. Mr. Medawar submitted that, in this case, the facts found by the justices supported their conclusion that the proper development of the child *was* being prevented and her health *was* being impaired and that this was avoidable. He submitted that this was attributable to conduct which was the deliberate conduct of the mother G and, looking at the situation as a continuing state of affairs, it was appropriate to take into consideration the matters which had in fact taken place whilst the child was still in her mother's womb. He submits that the decision of the Divisional Court has in effect divided the process of the child's development artificially. It is artificial to disregard the period before birth and to have regard only to events which have H occurred since the actual birth of the child.

Mr. Medawar has invited the court's attention to *M. v. Westminster City Council* [1985] F.L.R. 325 and, in particular, to a passage in the judgment of Butler-Sloss J., at p. 336:

"For my part, I find it impossible to find that for the primary condition to be established the child's proper development can only be considered as being avoidably prevented at the time of the hearing. A child's development is a continuing process. The present must be relevant in the context of what has happened in the past and it becomes a matter of degree as to how far in the past you go. It must be as, indeed, counsel for the children has urged upon us, in the interests of the children themselves that one should look at the past and, since we are considering the development of the children, we must look to see what it is that we must look at. I take the view that this very restrictive approach, put forward with great enthusiasm by counsel for the appellant, is quite inappropriate to the way in which one should look at the proper development of a child. Therefore, the magistrates' approach to this case, whereby they said that you look at the position when the proceedings were started and are entitled to interpret it in the light of anything relevant which has happened since, was an entirely proper way for them to consider this matter, and it leaves out any problems there may be as to the future because it is clear from their case that they did not consider the future in respect of the primary condition."

The facts of that case were different from the particular facts of the present case, but it is significant that, in this case, the Divisional Court did consider that it was appropriate and relevant to look at what had happened before the child was born. However, it seems to me that the Divisional Court fell into error in not applying the result of that view to the case because, in effect, it appears to me that it did restrict consideration of the development of the child to events which had taken place since its birth. In my view, that is too narrow an approach.

Mr. Townend on behalf of the guardian ad litem, the first respondent to this appeal, has argued that one should not have regard to what has taken place before the birth of the child. That seems to me to be the result of his submissions. He further argues that, in point of fact, an appropriate procedure in a case of this nature is for the wardship jurisdiction of the court to be invoked. However, having regard to the recent decisions of the House of Lords in *A. v. Liverpool City Council* [1982] A.C. 363 and *In re W. (A Minor) (Wardship: Jurisdiction)* [1985] A.C. 791, that is only appropriate if the statutory scheme provided by the Children and Young Persons Act 1969 is not applicable. In my judgment, bearing in mind that what one has to have regard to is the continuing process of the development of the child, section 1(2)(*a*) is apt to cover the facts of the present case,

Accordingly, I have come to the conclusion that the Divisional Court was wrong in the decision to which it came and that the justices were in fact correct when they stated in paragraph 7(b) of the case:

"However, we took the view that a child's development is a continuing process which encompasses the past and the present and we considered that events in the past life of this child, even during the time when it was a foetus in the womb, were relevant."

A Those events, which had the effect of preventing the proper development of, and of impairing the health of this child, were avoidable and, as a part of a continuing process, could and should have been in the contemplation of the court. Accordingly, they were entitled to find the primary condition of the section fulfilled and to proceed to make a care order, it not being disputed that the child was in need of care or control.

B In my judgment, the appeal should be allowed and the decision of the justices restored.

Woolf L.J. I agree that this appeal should be allowed and I gratefully adopt the facts as set out by Stephen Brown L.J. In my view, it is most important, when answering the questions posed by the justices C in the case stated, to look at the statutory provisions with which the justices were concerned and determine their proper interpretation. Section 1 of the Children and Young Persons Act 1969 contains a most important and valuable power giving a local authority the ability to go before a juvenile court and to obtain from that court orders for the care and protection of children. It is, however, to be noted that, as Mr. Reid D submitted on behalf of the mother, the procedure which flows from that section does in some degree interfere with the mother's rights which would exist in wardship proceedings, and it is, therefore, important from her point of view that, in cases which do not fall properly within section 1 of the Act of 1969, that procedure should not be invoked.

In my view, this case raises a question that has not previously come before the court as to whether or not matters which flow from what was E done to a child prior to its birth justify an order being made under section 1 of the Act of 1969 subsequent to its birth. If there was any doubt as to whether a child includes an unborn child for the purposes of section 1, in my view, that doubt is removed by section 70(1) of the Act of 1969 which defines a "child" as meaning "a person under the age of 14." A "person" denotes someone who is living, not someone who has F yet to be born.

It follows, in my view, from that approach to the interpretation of section 1 that what has to be considered in deciding whether the requirements of subsection (2)(*a*) have been met in any particular case is whether a living child's proper development is being prevented or neglected or a living child's health is being impaired or neglected or a living child is being ill-treated. However, the fact that the question has G to be posed in that way does not mean that what happened before the birth of the child has to be ignored for all purposes. In my view, the proper approach to the interpretation of section 1(2)(*a*) involves asking two questions, the first being, "Is the living child's proper development etc. being prevented or neglected?" and the second question being whether that was avoidable.

In considering those questions in relation to this case there was no H doubt that the child's health was being impaired and, because of that, the answer to the first question must be in the affirmative. The next question is: was that avoidable? Again, in my view, the answer must be in the affirmative because the mother, prior to the birth of the child,

should have taken steps to avoid the consequences to that child after its birth. Whereas in asking the first question I do not regard it as proper to look at what occurred before birth, in asking the second question it is, in my view, perfectly permissible to consider what happened before birth. The only matters with which the court is concerned in relation to the second question is: was it avoidable or not?

So far as the use in section 1(2) of the word "being" is concerned, I would respectfully adopt the approach of the Divisional Court of the Family Division in *M. v. Westminster City Council* [1985] F.L.R. 325 in the passage from the judgment of Butler-Sloss J., to which Stephen Brown L.J. referred, subject to one qualification. In that passage the judge said, at p. 336:

> "Therefore, the magistrates' approach to this case, whereby they said that you look at the position when the proceedings were started and are entitled to interpret it in the light of anything relevant which has happened since, was an entirely proper way for them to consider this matter . . ."

The judge, when the whole passage which Stephen Brown L.J. cited from her judgment is looked at, may not have been intending to limit her approach to a consideration of the situation at the time when the proceedings were started. If she was intending to limit consideration to that time or a consideration from that time, then I would respectfully disagree with her approach because, in my view, it is at the time of the hearing with which the justices are primarily concerned although, in accordance with what Butler-Sloss J. said, in approaching the matter you look at the continuing situation. I would respectfully, on this aspect, prefer the approach of Bush J. in the same case, at pp. 340–341:

> "The development of a child is a continuing matter and encompasses the past, present and, to a certain extent, the future. The magistrates, in determining the primary condition, must have regard to the past treatment of the child as well as to the present. They must ask themselves on the day of the hearing: 'Are we satisfied that his proper development is being avoidably prevented or neglected, or his health is being avoidably impaired or neglected?' They are not bound to answer the question in the negative if, for example, there has been a temporary respite in the condition or treatment of the child. In my view 'is being' is not temporal in the sense that it means 'now', 'this minute'; it is descriptive of the child, that is the child must fall into the category mentioned in the section. If the words used had been different then different considerations would apply. 'Has been' would indicate some time in the past; 'will be' would indicate some time in the future; 'is being' would indicate a situation over a period, not now at this precise moment but over a period of time sufficiently proximate to the date of the inquiry to indicate that it is the present, not history and not the days to come. It is the description of a continuing set of circumstances which may not obtain on the particular day on which the matter is being considered but represents a category which the

A description of the child fits. Whether the evidence available satisfies this criterion is a question of fact and degree."

Applying that approach, I would say, on the findings of fact of the justices in this case, that, so far as the questions posed in the Divisional Court are concerned, the answers would be as follows.

In relation to question (1), which is

B "Is it wrong in law for the juvenile court to find that the condition under section 1(2)(*a*) of the Children and Young Persons Act 1969 is satisfied in circumstances where the child has never been in the care of either parent or out of the care of responsible agencies?"

I would answer that it is possible, as a matter of law, for the juvenile court to find that the conditions under that section are satisfied in those C circumstances. In relation to question (2), which is

"Is the condition in section 1(2)(*a*) of the Children and Young Persons Act 1969 satisfied in respect of a child when the evidence of the child's proper development being avoidably prevented or neglected or its health being avoidably impaired or neglected or its being ill-treated relates to when the child was en ventre sa mère?"

D I would answer that question by saying that what the court is concerned with is the condition of the child after its birth, but matters occurring before the child were born can give rise to its being in a condition which satisfies the requirements of the section.

In relation to question (3), which is

E "On the facts found could the juvenile court properly find that the proper development of the child is being avoidably prevented or neglected or her health is being avoidably impaired or neglected or she is being ill-treated?"

I would answer that question in the affirmative, but I would say, on the facts of the particular case which was before the juvenile court, that the primary provision of the subsection with which the justices should have F been concerned related to the question of the health of the child. It was that which was being impaired as a result of what had occurred before its birth.

I do not consider that it is necessary for me to deal specifically with the fourth question because, clearly, this was, in my view, a matter falling within the juvenile court's jurisdiction under the Children and G Young Persons Act 1969.

It is for those reasons that I agree that this appeal should be allowed.

Dillon L.J. I agree that this appeal should be allowed. I would stress that there is no question whatever in this case of giving this child back to a mother who is a drug addict. There is no doubt that the child is in need of care and it is essentially a question of which is the H appropriate procedure to ensure that that care is provided. Is it the procedure of a care order made by the juvenile court in favour of the local authority under section 1 of the Children and Young Persons Act 1969 or is it the procedure of wardship in the Family Division?

It has been pointed out by Lord Scarman in *In re W. (A Minor) (Wardship: Jurisdiction)* [1985] A.C. 791, 795 that Parliament has, by a series of statutes, including in particular the Act of 1969, entrusted the responsibility for the care of children received into care by a local authority to the local authorities, subject to the safeguards specified in the legislation. It has been said by Lord Scarman and the other members of their Lordships' House that the purpose of the statutory scheme is clear, whatever difficulties may arise in the interpretation of some of the detailed provisions. It follows that, where the statutory scheme applies, there is no scope for wardship.

In the circumstances of this case, I have no doubt that, on the findings of the juvenile court, they were fully entitled to be satisfied that the primary condition in section 1(2)(*a*) of the Act was satisfied. The development of the child is, as has been pointed out, a continuing process. I have, for my part, sympathy with the view expressed by Butler-Sloss J. in *M. v. Westminster City Council* [1985] F.L.R. 325, 336 that the primary conditions should not be looked at as alternatives but be looked at as a whole. I do not see any antithesis between proper development and health. Here there is the continuing process that the mother was a taker of Methadone, both throughout the pregnancy and thereafter up to the conclusion of the hearing in the juvenile court. The child was therefore born affected by the drug and suffering from drug abuse symptoms which needed intensive special care for several weeks; and equally, because the drug abuse would have continued, the mother was unable to breast feed the child or look after the child. The whole process has to be looked at as a whole and, in my view, the primary condition in section 1(2)(*a*) was satisfied. The proper development of the child was avoidably prevented and her health was avoidably impaired.

That being so, this appeal should be allowed and the care order of the juvenile court should be restored.

Appeal allowed.
Legal aid taxation of cost of guardian ad litem and parents.
Leave to appeal refused.

Solicitors: D. C. H. Williams, Reading; Rowberry, Morris & Co., Reading; Blandy & Blandy, Reading.

S. H.

8 May 1986. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Brightman and Lord Goff of Chieveley) [1986] 1 W.L.R. 939 allowed a petition by the child for leave to appeal.

James Townend Q.C. and *Christopher Critchlow* for the appellant child. On its ordinary and natural meaning, section 1(2)(*a*) of the Children and Young Persons Act 1969 refers only to events presently in existence. *F. v. Suffolk County Council* (1981) 2 F.L.R. 208 (see *per* McNeill J., at p. 213E) and *M. v. Westminster City Council* [1985]

F.L.R. 325 (see *per* Bush J., at p. 340G) are distinguishable from the present case by virtue of the fact that the appellant has at no time during her life been in the care of the second respondents. Moreover, there was no evidence of conduct on the part of the second respondents causing the appellant's proper development to be avoidably prevented or neglected or her health to be avoidably impaired or neglected or that she was being ill-treated. It was a fact that the second respondents, registered drug addicts, continued to take drugs. The mother's drug-taking had caused the appellant's ill-health at birth, which prompted the care proceedings, but that particular conduct could not be repeated. Whether the continued use or abuse of drugs amounted to conduct that satisfied the condition in section 1(2)(*a*) was speculative on the facts of this case. The magistrates made no such finding of fact.

The female second respondent's drug abuse harmed the appellant before birth. That was a matter of history; it was not the present situation, nor could it be repeated "in days to come," nor was it a "continuing set of circumstances." While the second respondent's drug abuse might be a "continuing set of circumstances," there was no evidence on which the magistrates could find that that fact alone could satisfy the primary condition aforesaid, nor did they so find.

By section 70 of the Act of 1969 for the purposes of section 1 "child" is defined as a person under the age of 14. This means a person in being, that is, with a separate existence, and the expression is not apt to include a foetus. Further, section 1(2)(*a*) was never intended to permit the examination of the behaviour of a woman when pregnant.

The appellant concedes that, in appropriate circumstances, of which this is not one, it may be permissible for the court to look at the situation from the child's birth, but any examination of the situation prior to such birth, that is, prior to the separate existence of the child, is not permissible. The appellant does not accept that this approach is artificial, since one of the purposes of the Act of 1969 is to deal with children who are not receiving proper care. It is implicit in section 1(2)(*a*) that the orders that may be made by a court are to provide for those cases where a child is not receiving proper care from his parent, guardian or other responsible person. If the approach be adopted of asking two questions, first, "is the living child's proper development etc. being prevented or neglected?" and secondly, "is this avoidable?" then each such question is addressed in the present tense and cannot in any circumstances permit an examination of the situation before the child's birth. To permit such an examination would be to strain the ordinary meaning of the statute.

A proper construction of section 1(2)(*a*) empowers, inter alios, a local authority to take steps to terminate an avoidable set of circumstances, but in the instant case the state of the appellant's development and/or health once she was born was unavoidable.

"Avoidably" is quite clearly an adverb and as such must modify the verb. It cannot, however, modify a tense of the verb ("is being"). It is not submitted that the court can only look at the child at the time of the hearing (if it is then in a place of safety it can be said that it is not then

"being neglected"); the court must look to some extent at the past and even at the future. A

This Act was not designed to deal with this situation. It was passed with a view to the protection of the family and the prevention of juvenile delinquency. Damage in utero was certainly not in contemplation.

If the child's argument is right, the magistrates had no jurisdiction to make a place of safety order under section 28.

It is clear from section 1(2)(*bb*) that, when the draftsman has in mind something happening in the future, he sets that out; see also section 2. It is not conceded that section 1(2)(*a*) is capable of another construction. It is not ambiguous. The House should apply the natural and ordinary meaning to the words used. [Reference was made to *Essex County Council v. T.L.R. and K.B.R.* (1978) 143 J.P. 309.] B

T. Scott Baker Q.C. and *Paul W. Reid* for the second respondents, the child's parents. The second respondents adopt the submissions made on behalf of the child as to the construction of section 1(2)(*a*) of the Act of 1969. That is the only construction that gives the language of the Act its natural meaning. The words of the Act are unambiguous, and no departure from their ordinary meaning is permissible. C

The second respondents make the following separate submission. It is relevant in construing section 1(2)(*a*) to give regard to the fact that the local authority's construction results in the second respondents' rights in wardship being, in practice, impaired or overridden. This is a result of *A. v. Liverpool City Council* [1982] A.C. 363. Such a consequence should be avoided if possible. The following points are made: (1) it is now well settled law that where the scheme under the Act of 1969 is applicable wardship proceedings are inappropriate: *A. v. Liverpool City Council* and *In re W. (A Minor) (Wardship: Jurisdiction)* [1985] A.C. 791. (2) The question in the present case is whether the statutory scheme is in law applicable. This is a question of the true construction of section 1(2)(*a*). The case does not go wider than the construction of this section. (3) In deciding whether to construe the section narrowly or widely (if the House has an option as to which to do) it is important to consider the consequences as regards the parents: see *per* Woolf L.J., ante, p. 000. The parents' rights receive greater consideration in wardship proceedings than they do in care proceedings, since: (i) in wardship proceedings the parents are party to the proceedings if they wish to participate fully. In care proceedings the position of the parents is covered by rule 14B of the Magistrates' Courts (Children and Young Persons) Rules 1970. (S.I. 1970 No. 1792 (L.32)). (ii) The very nature of the proceedings in the magistrates' court is much more summary than wardship proceedings in that, for example, in wardship proceedings there will be affidavits and the parents will have proper advance notice of the case to be met. Further, in the magistrates' court it is likely that the case will be conducted by less experienced advocates. Thirdly the matter will be dealt with by magistrates rather than by a judge of the High Court. (iii) In wardship proceedings the parents have an unfettered right for access to be considered on its merits. In care proceedings the parents' right to apply for an access order is under section 12C of the Child Care Act 1980 (which was, no doubt, introduced D E F G H

(see the Health and Social Services and Social Security Adjudication Act 1983, s. 6, Sch. 1, Pt. I, para. 1) as a result of *A. v. Liverpool City Council*). Those difficulties only arise if the local authority first served the parents with notice of refusal of access; then, the parents can go to the magistrates; but if the local authority reduce access to an unacceptable minimum without terminating it altogether there is nothing (apart from judicial review) that the parents can do about it. Where the House is seeking to apply one of various possible rules of construction this is a good reason why the literal rule should be applied. (4) As to rights of appeal, in care proceedings there is a right of appeal to the Crown Court, but it is the child's right, not the parents' where the parents do not represent the child, i.e. an order for separate representation has been made under section 32A of the Act of 1969 (see *A.-R. v. Avon County Council* [1985] Fam. 150); see sections 2 and 3 of the Children and Young Persons (Amendment) Act 1986, not yet in force. There can be an application to the Divisional Court on a point of law on judicial review, but at the moment the parents may be deprived of care and control on the merits of the case with no right of appeal to anybody. So, if the House has a choice, the wardship route is preferable. The overriding interest in both wardship and care proceedings is the interests of the child. That is most likely to be achieved in proceedings that give consideration to all the circumstances. If the proceedings are such that the parents' rights are curtailed there is a greater risk that they will not result in an answer in the best interests of the child. Thus, again, the narrow construction of section 1(2)(*a*) is appropriate.

On construction, the second respondents emphasise that, if one looks at the opening words of section 1(2)(*a*), the first words are "his proper development." "His" clearly refers to the child or young person referred to three lines above. One should look at the definition of "child" in section 70(1): "a person under the age of 14." Clearly, therefore, "his" is relating to a person as defined by the Act: i.e. who has been born and has a separate existence from the mother. Section 1(2)(*a*) is not intended to deal with what happened to a foetus whilst carried by the mother during pregnancy. If it had been intended to apply to a foetus, how far back does one stop? A foetus in the embryonic stage (during the first six weeks after fertilisation)? One should be wary of anything of that kind. The magistrates' finding of fact was that the only harm that had come to this child had occurred before she was born. What happened before she was born may be part of the evidence, but it is not part of the continuum.

Nicholas Medawar Q.C. and *Barbara Slomnicka* for the first respondents, the local authority. (i) Parliament has by statute entrusted to local authorities the power and the duty to make decisions as to the welfare of children: *A. v. Liverpool City Council* [1982] A.C. 363, 372A–373D (Lord Wilberforce); 379D–G (Lord Roskill); *In re W. (A Minor) (Wardship: Jurisdiction)* [1985] A.C. 791, *per* Lord Scarman. (ii) By section 2(2) of the Act of 1969 a local authority has the duty to exercise its power under section 1 to bring care proceedings in respect of any child in its area in respect of whom it appears to it that there are grounds for so doing unless satisfied that it is neither in the child's

interest nor in the public interest to do so. (iii) Section 1 requires two conditions to be satisfied before an order can be made in respect of a child under this section by a juvenile court. (iv) The primary condition is any of the conditions set out in section 1(2); only that contained in section 1(2)(*a*) is relevant to this appeal. (v) The secondary condition is that the child is in need of care and control, and there is no issue as to this. (vi) The primary condition could be, and was, satisfied by the facts found by the justices. (vii) There is nothing in section 1(2)(*a*) that restricts evidence to what has happened to a child since birth, and evidence of what occurred whilst a child was still in the womb can be and is appropriate when a living child is being affected by what then happened. (viii) A juvenile court must be satisfied that the proper development or health of a child is being affected (in one or other of the ways specified), but there is nothing in the subsection that limits the cause to something then continuing. (ix) The fact, if so, that the conduct the cause of the effect cannot be repeated is irrelevant as regards the primary condition. (x) Even if the mother's conduct towards the child (other than her continuing abuse of drugs) related only to the period before birth, that is sufficient to bring the matter within the subsection when consideration is being given to whether or not such conduct and its consequences were avoidable. (xi) Although the power given by the subsection may only be exercised in relation to a living child, what happened to the child whilst still in the womb is relevant and ought to be considered, and if the living child's proper development or health is being affected (in one or other of the ways specified) and this was avoidable then the primary condition is made out whether or not the conduct the cause of the effect occurred before birth only of both before and after birth. (xii) The approach to the subsection adopted by the Divisional Court of the Family Division in *M. v. Westminster City Council* [1985] F.L.R. 325 is correct and ought to be applied: see *per* Butler-Sloss J., at p. 336D–E, and *per* Bush J., at pp. 340H—341C: the development of a child is properly to be viewed as one continuum, continuing during pregnancy and since birth, and admits of no artificial division into what happened prior to birth and what has happened since birth; any such distinction is unreal and inappropriate.

The facts found by the justices supported their conclusion. A child's development is a continuing process that encompasses the past and the present, and events during the past life of a child, even during the time when it was a foetus in the womb, are relevant when considering whether those events and their consequences were avoidable. Save when a child is being ill-treated the application of section 1(2)(*a*) involves the justices asking themselves two questions: (1) "are we satisfied that the child's proper development is being prevented or neglected or his health is being impaired or neglected?" and (2) "was that avoidable?" If the answer to both questions is yes, the primary condition contained in the subsection is made out. Taking the words in their ordinary meaning, there was a proper finding by the justices that this child's proper development was being prevented at the time of the hearing. A place of safety order is cheaper and quicker than wardship proceedings.

A *Townend Q.C.* in reply. One should take the literal and grammatical meaning of the words first. Only if they are ambiguous should one go on to consider the purposive test. The interpretation put forward on behalf of the child does not defeat the whole purpose of the Act or of section 1(2)(*a*). It simply excludes this particular test. A continuum implies something in the nature or repetition. That is by definition in this case impossible.

B There was ample time in this case for wardship proceedings to be brought. The expedition argument is not relevant.

Scott Baker Q.C. in reply. "Avoidably" means from the point of view of the magistrates hearing the case. That fits in with the purpose of the legislation: they ask themselves: "is there anything that we, the justices, can do about this?"

C

4 December. Lord Keith of Kinkel. My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Brandon of Oakbrook. I agree with it, and for the reasons he gives would dismiss the appeal.

D Lord Brandon of Oakbrook. My Lords, on 1 August 1985 the justices of the petty sessional division of Reading, sitting as a juvenile court at the Civic Centre, Reading, made an order ("the care order") committing the case of a baby girl ("the child") to the care of the Berkshire County Council ("the authority"). The original parties to the proceedings consisted only of the authority and the child, for whom a E guardian ad litem was appointed. The child's parents, however, were subsequently allowed to intervene and take part in the proceedings. The care order having been made, the child by her guardian ad litem appealed by way of case stated against it to a Divisional Court of the Family Division of the High Court (Hollings and Waite JJ.). An order was made before the hearing of the appeal that the parents should be parties to it as second respondents, and at the hearing of the appeal they F were separately represented by counsel, who supported the child's appeal. By an order made on 4 February 1986 the Divisional Court allowed the appeal and discharged the care order. The authority, with the leave of the Divisional Court, appealed to the Court of Appeal (Dillon, Stephen Brown and Woolf L.JJ.), and that court by an order made on 19 March 1986 allowed the appeal, setting aside the order of G the Divisional Court and restoring the care order. The child by her guardian ad litem now brings a further appeal to your Lordships' House with the leave of that House. The parents appear again separately by counsel as second respondents supporting the child's appeal. The sole question to be decided by your Lordships, as it was in both the Divisional Court and the Court of Appeal, is whether, having regard, first, to the terms of the relevant statutory provisions, and, secondly, to H the facts of the particular case, the juvenile court had jurisdiction to make the care order. It is not contended for the child or the parents that, if the juvenile court had jurisdiction to make the care order, they were wrong to exercise it.

The relevant statutory provisions are to be found in the Children and Young Persons Act 1969 as later amended* and are in these terms:

"1(1) Any local authority . . . who reasonably believes that there are grounds for making an order under this section in respect of a child . . . may . . . bring him before a juvenile court. (2) If the court before which a child . . . is brought under this section is of opinion that any of the following conditions is satisfied with respect to him, that is to say—(*a*) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated; or (*b*) it is probable that the condition set out in the preceding paragraph will be satisfied in his case, having regard to the fact that the court or another court has found that that condition is or was satisfied in the case of another child . . . who is or was a member of the household to which he belongs; or (*bb*) it is probable that the condition set out in paragraph (*a*) of this subsection will be satisfied in his case, having regard to the fact that a person who has been convicted of an offence mentioned in Schedule 1 to the [Children and Young Persons Act 1933] . . . is, or may become, a member of the same household as the child . . . and also that he is in need of care or control which he is unlikely to receive unless the court makes an order under this section in respect of him, then . . . the court may if it thinks fit make such an order. (3) The order which a court may make under this section in respect of a child . . . is— . . . (*c*) a care order (other than an interim order); . . .

"28(1) If, upon an application to a justice by any person for authority to detain a child . . . and take him to a place of safety, the justice is satisfied that the applicant has reasonable cause to believe that—(*a*) any of the conditions set out in section 1(2)(*a*) to (*e*) of this Act is satisfied in respect of the child . . . the justice may grant the application; and the child . . . in respect of whom an authorisation is issued under this subsection may be detained in a place of safety by virtue of the authorisation for 28 days beginning with the date of authorisation, or for such shorter period beginning with that date as may be specified in the authorisation. . . . (6) If while a person is detained in pursuance of this section an application for an interim order in respect of him is made to a magistrates' court or a justice, the court or justice shall either make or refuse to make the order. . . ."

"70(1) In this Act, unless the contrary intention appears, the following expressions have the following meanings:— . . . 'child' . . . means a person under the age of 14 . . . ."

The particular facts of the case, as found by the juvenile court and set out in the case stated, are as follows. (a) The child was born to the mother, then aged 29, on 12 March 1985 at the Royal Berkshire Hospital, Reading. (b) At the time of her birth the child was suffering

* Section 1(2)(*bb*) was added by the Children Act 1975 (c. 72), s. 108(1)(*a*), Sch. 3, para. 67 and substituted by the Health and Social Services and Social Security Adjudications Act 1983 (c. 41), s. 9, Sch. 2, para. 10.

from symptoms caused by withdrawal from narcotics. (c) The mother had been a registered drug addict since 1982 and had been taking drugs for approximately 10 years. (d) The mother had continued to take drugs, both by oral means and by injection, from the time when she knew that she was pregnant to the time when the child was born. (e) During the pregnancy the mother took drugs in excess of those which were prescribed for her by a registered medical practitioner. (f) The mother knew that by taking drugs whilst pregnant she could be causing damage to her child. (g) The child was kept in intensive care in hospital for several weeks immediately following the birth. A place of safety order was obtained by Berkshire social services on 23 April 1985 and successive interim care orders were in force from 13 May 1985 to the date of hearing. (h) The child had not been in the care or control of the mother or the father since her birth. (i) The medical condition in which the child was born was a direct result of deliberate and excessive taking of drugs by the mother during pregnancy. (j) The mother, and the father too, continued to be addicted to drugs and remained so on the final day of the hearing of this case.

The question whether the juvenile court had jurisdiction to make the care order depends on whether the particular facts of the case brought it within paragraph (*a*) and the latter part of section 1(2) of the Act of 1969. This in turn means that the only basis on which the juvenile court could have had such jurisdiction was that two conditions were satisfied. The primary condition, arising from paragraph (*a*) of subsection (2), is that (i) the proper development of the child was being avoidably prevented or neglected, or (ii) the health of the child was being avoidably impaired or neglected, or (iii) the child was being ill-treated. The secondary condition, arising from the latter part of subsection (2), is that the child was in need of care and control which she was unlikely to receive unless the court made a care order. It has never been in dispute that the secondary condition was satisfied; but there is and has been a dispute between the authority on the one hand, and the child and the parents on the other hand, as to whether the primary condition was satisfied.

In the case stated the juvenile court, after reciting the submissions made to them on behalf of the authority, the child and the parents, expressed this opinion:

> "We accepted that the particular circumstances on which the primary condition was based would not recur since the child had now been born. However, we took the view that a child's development is a continuing process which encompasses the past and the present and we considered that events in the past life of this child, even during the time when it was a foetus in the womb, were relevant. For this reason we considered that we were entitled to have regard to the mother's abuse of her own bodily health during pregnancy when deciding whether the condition in section 1(2)(*a*) [of the] Children and Young Persons Act 1969 was proved in respect of the child born of that pregnancy. We were satisfied that the child's proper development was being avoidably prevented or neglected or her health was being avoidably impaired or neglected or she was being

ill-treated. In so deciding we accepted that we should not look at the future development of the child."

The juvenile court went on to state four questions for the opinion of the High Court:

"1. Is it wrong in law for the juvenile court to find that the condition under section 1(2)(*a*) of the Children and Young Persons Act 1969 is satisfied in circumstances where the child has never been in the care of either parent or out of the care of responsible agencies? 2. Is the condition in section 1(2)(*a*) of the Children and Young Persons Act 1969 satisfied in respect of a child when the evidence of the child's proper development being avoidably prevented or neglected or its health being avoidably impaired or neglected or its being ill-treated relates to when the child was 'en ventre sa mère'? 3. On the facts found could the juvenile court properly find that the proper development of the child is being avoidably prevented or neglected or her health is being avoidably impaired or neglected or she is being ill-treated? 4. In considering section 1(2)(*a*) of the Children and Young Persons Act 1969 should the juvenile court have considered the availability of wardship proceedings and/or proceedings under the Child Care Act 1980 and/or any other powers and procedures available to the local authority?"

Before examining the way in which first the Divisional Court, and secondly the Court of Appeal, dealt with the case stated, it will be convenient to refer to three reported cases on the meaning of the expression "is being" in section 1(2)(*a*) of the Act of 1969, all of which were cited to the juvenile court and the Divisional Court, and the last two of which were cited to the Court of Appeal.

In *Essex County Council v. T.L.R. and K.B.R.* (1978) 143 J.P. 309 (also reported more shortly in 9 Fam. Law 15) the custody of two children, the marriage of whose parents had broken down, was early in 1974 granted to their father, a soldier then serving in England. In March 1974, at the request of the father on his being posted to Hong Kong, the children were voluntarily received into the care of the Essex County Council, which placed them with foster parents in Colchester. In 1976 the Essex County Council received information that the father, who was by that time serving in Northern Ireland, intended to go to Hong Kong to marry a Chinese woman, and then to come to Colchester to collect the children and take them to live with him in Northern Ireland. The Essex County Council, in order to prevent the removal of the children, sought a care order from a juvenile court at Colchester under section 1(2)(*a*) of the Act of 1969, and, as a preliminary to those proceedings, applied for and was granted authority to detain the children temporarily in a place of safety. Up to and at the time of the hearing the fostering of the children was entirely satisfactory, in that their proper development was being promoted, their health was being safeguarded and they were being well treated. The juvenile court having refused to make a care order, the Essex County Council appealed by way of case stated to a Divisional Court of the Queen's Bench Division (Lord Widgery C.J. and

Kilner Brown and Robert Goff JJ.). That court held, upholding the decision of the juvenile court, that there was no material on which that court could have found that any of the conditions specified in section 1(2)(*a*) was satisfied.

Robert Goff J., with whom Lord Widgery C.J. and Kilner Brown J. both agreed, said, at pp. 311–312:

> "In my judgment, the conclusion of the justices was right in law, and, not only that, it was right for the correct reasons. It is clear that they approached the statute in accordance with the correct legal principles. They first looked at the relevant part of the subsection (sub-paragraph (*a*)) in its context in the Act and ascertained its natural and ordinary meaning, and concluded, in my judgment correctly, that on its natural and ordinary meaning it refers only to events presently in existence. They then asked themselves the question: Does the context require any different construction? On examining the context, they saw from the statute that the immediately following part of the subsection (sub-paragraph (*b*)) dealt with the probability that the condition set out in the preceding paragraph would be satisfied and limited by its words the circumstances in which such a probability could be considered. I can add that there appears to have been added to the statute another sub-paragraph, (*bb*), wherein a further specific circumstance can be taken into account which may give rise to a probability that the condition set out in sub-paragraph (*a*) of that subsection will be satisfied. These two sub-paragraphs—(*b*) and (*bb*)—show that the words of sub-paragraph (*a*) should be given their natural and ordinary meaning, viz., that it is only concerned with presently existing events and not with future or probable events, the latter being specifically dealt with in the succeeding sub-paragraphs. Counsel for the appellants has urged upon us that to adopt what she has called 'a literal interpretation' would have the effect that courts cannot take account of future events when it is highly desirable that they should be able to do so. As to that, I would say only this. The construction adopted by the magistrates is, in my judgment, the only possible construction one can place upon the clear wording of the statute, having regard to the words used and the context in which these words are found, and, however desirable it may be that the court should have wider powers than those conferred upon it by the statute, it is the duty of this court to give effect to the clear words of the statute."

In *F. v. Suffolk County Council* (1981) 2 F.L.R. 208, McNeill J., sitting as a single-judge Divisional Court of the Queen's Bench Division, had before him an appeal by way of case stated against a care order in respect of a child made by a juvenile court at Lowestoft on the ground that the proper development of the child was being avoidably prevented or neglected. In the course of a judgment upholding the care order he said, at p. 213:

> "What the court has to consider, as I see it, is this: is there present avoidable neglect or prevention? That is the present tense application

to those words. Is that something which is happening now, or it may be has happened, with the result that the proper development of the child is affected in those ways? The proper development of the child is a continuing process, past, present, and future, and what the court has to look at, in my view, is the present conduct and its effect on the development of the child in the past, at the present time and at any rate in the foreseeable future. Development being a continuing matter, I do not think this section is intended to rule out of consideration either mental development or development in its broadest and continuing sense."

In *M. v. Westminster City Council* [1985] F.L.R. 325, a Divisional Court of the Family Division (Bush and Butler-Sloss JJ.) had before it an appeal by way of case stated against a care order made in respect of a child by the Westminster North juvenile court. It had been contended by counsel for the appellant (Miss Hoyal) that, because of the use of the expression "is being" in section 1(2)(*a*) of the Act of 1969, the justices were only entitled to look at the situation of the child as at the date of the hearing before them and were not entitled to look at its previous situation. Butler-Sloss J., delivering the first judgment at the request of Bush J., rejected this contention. She referred, at p. 335, to the passage in the judgment of McNeill J. in *F. v. Suffolk County Council*, 2 F.L.R. 208, 213 which I cited above, and, subject to some possible qualification as to how far in the future the court should look, expressed her complete agreement with it. She went on to say, at p. 336:

"For my part, I find it impossible to find that for the primary condition to be established the child's proper development can only be considered as being avoidably prevented at the time of the hearing. A child's development is a continuing process. The present must be relevant in the context of what has happened in the past and it becomes a matter of degree as to how far in the past you go. . . . I take the view that this very restrictive approach, put forward . . . by counsel for the appellant, is quite inappropriate to the way in which one should look at the proper development of a child. Therefore, the magistrates' approach to this case, whereby they said that you look at the position when the proceedings were started and are entitled to interpret it in the light of anything relevant which has happened since, was an entirely proper way for them to consider this matter, and it leaves out any problems there may be as to the future because it is clear from their case that they did not consider the future in respect of the primary condition. It is right, it seems to me, looking at the primary conditions, that they should not be looked at as alternatives but looked at as a whole."

Bush J., delivering the second judgment, said, at pp. 340–341:

"If the strict interpretation urged by Miss Hoyal were accepted, then there never could be a care order made, for example, in the case [of] a child who had recovered from the injury done to him and who was in the benign care of foster parents or a children's home. I cannot think that that was the intention of Parliament. It is

clear, of course, that in using the present tense Parliament was expressly ruling out a care order because of fear of future harm where there was nothing presently in the condition or treatment of the child whereby his proper development was being avoidably prevented or neglected or his health avoidably impaired or neglected. This must be the basis of the decision in the Divisional Court in *Essex County Council v. T.L.R. and K.B.R.*, 9 Fam. Law 15 though, of course, the report we have for our purposes is wholly inadequate. The development of the child is a continuing matter and encompasses the past, present and, to a certain extent, the future. The magistrates, in determining the primary condition, must have regard to the past treatment of the child as well as to the present. They must ask themselves on the day of the hearing: 'Are we satisfied that his proper development is being avoidably prevented or neglected, or his health is being avoidably impaired or neglected?' They are not bound to answer the question in the negative if, for example, there has been a temporary respite in the condition or treatment of the child. In my view 'is being' is not temporal in the sense that it means 'now,' 'this minute'; it is descriptive of the child, that is the child must fall into the category mentioned in the section. If the words used had been different then different considerations would apply. 'Has been' would indicate some time in the past; 'will be' would indicate some time in the future; 'is being' would indicate a situation over a period, not now at this precise moment but over a period of time sufficiently proximate to the date of the inquiry to indicate that it is the present, not history and not the days to come. It is the description of a continuing set of circumstances which may not obtain on the particular day on which the matter is being considered but represents a category which the description of the child fits."

I now turn to examine the way in which first the Divisional Court, and later the Court of Appeal, dealt with the problems which arise in the present case. Hollings J. delivered the leading judgment in the Divisional Court. He referred to the last two of the three reported cases to which I have drawn attention and it seems clear that he accepted the general correctness of the views expressed by McNeill J. in the one case and by Butler-Sloss J. and Bush J. in the other. Despite this, he said:

"The difficulty which, however, I have found is this: that unlike *M. v. Westminster City Council* and *F. v. Suffolk County Council* the whole of the conduct, if I may so describe it, of the mother vis-à-vis the child relates to the period before birth. The mother's present conduct vis-à-vis the child has never been tested, and of its very nature her previous conduct vis-à-vis this child can never be repeated. It is that circumstance which to my mind distinguishes this case from that of *M. v. Westminster City Council*, and indeed from *F. v. Suffolk County Council*. The only evidence before the justices as to the situation after the birth of the child was that this mother and father (one of course is concerned chiefly with the mother) continue, or continued at least until the hearing before the

magistrates, to take Class A drugs. There was no evidence before the magistrates as to the effect that had or might have on her caring for the child. There was no evidence to suggest that her abuse or use of drugs would affect the child or that they would administer drugs to the child. Indeed no one has suggested that the mother would do so, I hasten to add. As Miss Slomnicka submitted in *M. v. Westminster City Council*, in the case of a battered child who is now in the care of a local authority one cannot say this condition does not apply because the child is now in care. That is because the child was battered when in the care of the mother and alive, and it is only because of the intervention of the social services and the care application that the child is no longer with the mother. What the magistrates have realistically to be concerned with is not the situation technically as it is before them at the time but the situation in the continuum, as it has been described by Butler-Sloss J. and Bush J. They had to look at the ability of the mother and the risk to the child in the light of the past, with some thought to the future, though not so far into the future. In the present case there is a notable absence of any such state of affairs. That this child is in need of care and control is, as I said at the outset, conceded. However, in my judgment the magistrates, confined as they were to the provisions of that section of the Act of 1969, as interpreted by the two cases to which I have referred, even though they were entitled to look at what happened during the pregnancy, ought not . . . to have come to the conclusion that this condition has been satisfied in any of its respects, for the reasons I have already stated."

Hollings J. went on to deal with the four questions of law posed by the juvenile court in the case stated. With regard to question 1, whether it was wrong in law for the juvenile court to find that the condition under section 1(2)(*a*) of the Act of 1969 was satisfied in circumstances where the child had never been in the care of either parent, or out of the care of responsible agencies, Hollings J. said that there might be cases in the future in which it might be right to find that condition proved, even though the child was never in the care of either parent, but it was wrong in this case. To question 2, whether the condition in section 1(2)(*a*) of the Act of 1969 was satisfied in respect of the child when the evidence (which he emphasised was the only evidence) that the child's proper development was being avoidably prevented or neglected or her health was being avoidably impaired or neglected or she was being ill-treated related to when the child was en ventre sa mère, Hollings J. gave a negative answer. To question 3, whether on the facts found the juvenile court could properly find that the proper development of the child was being avoidably prevented or neglected or her health was being avoidably impaired or neglected or she was being ill-treated, and also to question 4, whether in considering section 1(2)(*a*) of the Act of 1969 the juvenile court should have considered the availability of wardship proceedings and/or any other powers or

procedures available to the authority, Hollings J. again gave negative answers. Waite J. agreed with the judgment of Hollings J.

The first judgment in the Court of Appeal (ante, p. 323c) was delivered by Stephen Brown L.J. He referred, ante, p. 326a–d, to the passage in the judgment of Butler-Sloss J. in *M. v. Westminster City Council* [1985] F.L.R. 325, 336 which I cited earlier and continued, ante, pp. 326d—327b:

> "The facts of that case were different from the particular facts of the present case, but it is significant that, in this case, the Divisional Court did consider that it was appropriate and relevant to look at what had happened before the child was born. However, it seems to me that the Divisional Court fell into error in not applying the result of that view to the case because, in effect, it appears to me that it did restrict consideration of the development of the child to events which had taken place since its birth. In my view, that is too narrow an approach. . . . Accordingly, I have come to the conclusion that the Divisional Court was wrong in the decision to which it came and that the justices were in fact correct when they stated in paragraph 7(b) of the case: 'However, we took the view that a child's development is a continuing process which encompasses the past and the present and we considered that events in the past life of this child, even during the time when it was a foetus in the womb, were relevant.' Those events, which had the effect of preventing the proper development of, and of impairing the health of, this child, were avoidable and, as a part of a continuing process, could and should have been in the contemplation of the court. Accordingly, they were entitled to find the primary condition of the section fulfilled and to proceed to make a care order, it not being disputed that the child was in need of care or control."

Woolf L.J., who delivered the second judgment, said, ante, p. 327e—328a:

> "In my view, this case raises a question that has not previously come before the court as to whether or not matters which flow from what was done to a child prior to its birth justify an order being made under section 1 of the Act of 1969 subsequent to its birth. If there was any doubt as to whether a child includes an unborn child for the purposes of section 1, in my view, that doubt is removed by section 70(1) of the Act of 1969 which defines a 'child' as meaning 'a person under the age of 14.' A 'person' denotes someone who is living, not someone who has yet to be born. It follows, in my view, from that approach to the interpretation of section 1 that what has to be considered in deciding whether the requirements of subsection (2)(*a*) have been met in any particular case is whether a living child's proper development is being prevented or neglected or a living child's health is being prevented or neglected or a living child is being ill-treated. However, the fact that the question has to be posed in that way does not mean that what happened before the birth of the child has to be ignored for all purposes. In my view, the proper approach to the interpretation of section 1(2)(*a*) involves

asking two questions, the first being, 'Is the living child's proper development etc. being prevented or neglected?' and the second question being whether that was avoidable. In considering those questions in relation to this case there was no doubt that the child's health was being impaired and, because of that, the answer to the first question must be in the affirmative. The next question is: was that avoidable? Again, in my view, the answer must be in the affirmative because the mother, prior to the birth of the child, should have taken steps to avoid the consequences to that child after its birth. Whereas in asking the first question I do not regard it as proper to look at what occurred before birth, in asking the second question it is, in my view, perfectly permissible to consider what happened before birth. The only matter with which the court is concerned in relation to the second question is: was it avoidable or not?"

Later, Woolf L.J. indicated, ante, p. 329A–G, how he would answer the four questions of law posed in the case stated. With regard to question 1 he said that it was possible, as a matter of law, for the juvenile court to find that the conditions under section 1(2)(*a*) of the Act of 1969 were satisfied in the circumstances set out. With regard to question 2 he said that what the court was concerned with was the condition of the child after its birth, but matters occurring before the child was born could give rise to its being in a condition which satisfied the requirements of the section. With regard to question 3, he said that he would answer it affirmatively, but stressed that the main matter with which the justices should have been concerned was the child's health. He did not consider it necessary to answer question 4.

Dillon L.J., who delivered the third judgment, said, ante, p. 330B–E:

"In the circumstances of this case, I have no doubt that, on the findings of the juvenile court, they were fully entitled to be satisfied that the primary condition in section 1(2)(*a*) of the Act was satisfied. The development of the child is, as has been pointed out, a continuing process. I have, for my part, sympathy with the view expressed by Butler-Sloss J. in *M. v. Westminster City Council* [1985] F.L.R. 325, 336 that the primary conditions should not be looked at as alternatives but be looked at as a whole. I do not see any antithesis between proper development and health. Here there is the continuing process that the mother was a taker of Methadone, both throughout the pregnancy and thereafter up to the conclusion of the hearing in the juvenile court. The child was therefore born affected by the drug and suffering from drug abuse symptoms which needed intensive special care for several weeks; and equally, because the drug abuse would have continued, the mother was unable to breast-feed the child or look after the child. The whole process has to be looked at as a whole and, in my view, the primary condition in section 1(2)(*a*) was satisfied. The proper development of the child was avoidably prevented and her health was avoidably impaired."

The appeal raises a number of questions with regard to the meaning and effect of section 1(2)(*a*) of the Act of 1969. The first question is

whether the three situations (I prefer to call them "situations" rather than "conditions") described in section 1(2)(*a*) are to be regarded as alternatives or are to be looked at as a whole. Butler-Sloss J. in *M. v. Westminster City Council* [1985] F.L.R. 325, 336 expressed the view that the three situations should be looked at as a whole, on the ground, as I understand it, that there was no necessary antithesis between them. Dillon L.J. in the Court of Appeal in the present case, ante, p. 330c, expressed sympathy with that view. With respect to both Butler-Sloss J. and Dillon L.J., I cannot agree with them on this point. It seems to me that, on the ordinary and natural meaning of the words used, the three situations are to be regarded as alternatives. So to regard them is in no way inconsistent with the likelihood that, in many cases, any two of the three situations, or indeed all three of them, may co-exist.

There follows a series of questions relating to the meaning and effect of the expression "is being," as used in the description of each of the three situations. First, does the expression refer to an instant, or to a continuing, situation? Secondly, if it refers to a continuing situation, as at what point of time should the court consider whether that continuing situation exists? Thirdly, how far back and how far forward, if at all, from that point of time should the court look? Fourthly, can the court look back to the time before the child concerned was born?

With regard to the first of these questions relating to the expression "is being," there are, in my view, two compelling reasons for concluding that what is being referred to is a continuing, rather than an instant, situation. The first reason is that the use of the present continuous of itself indicates a reference to a continuing situation or state of affairs. The second reason is that the concepts of development, health and treatment of a child, which are the three alternative concepts dealt with in section 1(2)(*a*), are themselves continuing concepts. It follows that I agree broadly with the views expressed on the matter by McNeill J. in *F. v. Suffolk County Council*, 2 F.L.R. 208, 213, and by Bush J. and Butler-Sloss J. in *M. v. Westminster City Council* [1985] F.L.R. 325, 336, 340–341, as did both the Divisional Court and the Court of Appeal in the present case.

With regard to the second question relating to the expression "is being," it is, in my opinion, necessary to have in mind the purpose sought to be achieved not only by section 1 but also by section 28 of the Act of 1969. The effect of section 28, when combined with that of section 1, is to create a process for the protection of children which may often include three separate but connected stages. The first stage is the grant by a justice to an applicant under section 28(1) of authority to detain a child and take it to a place of safety for up to 28 days. Where the ground of the application is concern about the present development, health or treatment of a child, the justice can only accede to it if he or she is satisfied that the applicant has reasonable cause to believe that one or more of the three situations described in section 1(2)(*a*) exists in respect of the child. The second stage is the making by a magistrates' court or a justice of one or more interim care orders under section 28(6). The purpose of such an order or orders is to preserve, for the protection of the child, the temporarily safe situation created by the

original authority to detain the child and keep it in a safe place granted under section 28(1) until the third stage is reached. That third stage is the hearing and determination of proceedings for a full care order (by which I mean a care order which is not an interim one) to be made under section 1.

All these three stages were gone through in the present case. Authority to detain the child and take it to a place of safety was granted on 23 April 1985. Then, proceedings for a full care order having been begun on 25 April 1985, successive interim care orders were made on 13 May, 10 June and 8 July 1985. Finally, the hearing of the proceedings for the making of a full care order took place on 23 and 25 July and 1 August 1985, the order being made on the last of these dates. In the result a period of just over 14 weeks elapsed between the original authority to detain and take to a place of safety being granted and a full care order being made, and throughout that period the child was in the safe care of foster parents chosen by the authority.

Against the background of these three possible stages in the process of protecting a child under sections 1 and 28 it is, in my view, clear that the court, in considering whether a continuing situation of one or other of the kinds described in section 1(2)(*a*) exists, must do so as at the point of time immediately before the process of protecting the child concerned is first put into motion. To consider that matter at a point of time when the child has been placed under protection for several weeks, first by a place of safety order and then by one or more interim care orders, would, as pointed out by Bush J. in *M. v. Westminster City Council* [1985] F.L.R. 325, 340, defeat the purpose of Parliament. I would answer the second question relating to the expression "is being" accordingly.

With regard to the third question relating to the expression "is being," it seems to me that the court, in considering, as at the point of time immediately before the process of protecting the child concerned is first put into motion, whether a continuing situation of any of the three kinds described in section 1(2)(*a*) exists, must look both at the situation as it is at that point of time and also at the situation as it has been in the past: how far back in the past must depend on the facts of any particular case. Should the court look at the future as well? In my view it should, but only in a hypothetical way by looking to see whether the situation which began earlier and was still continuing at the point of time immediately before the process of protecting the child was put into motion would, if that process had not been put into motion, have been likely to continue further. I would not think it right for the court to look at the future alone: only at the hypothetical future in conjunction with the actual present (in the sense in which I have defined that concept) and the actual past. It follows that I agree with the decision in *Essex County Council v. T.L.R. and K.B.R.*, 143 J.P. 309 on its facts, for in that case the court was being asked to look at the future alone without any connection with the present or the past. The case must not, however, be regarded as good authority for the wider proposition that it is never permissible for the court to look at the hypothetical future, so long as it does so in conjunction with the present and the past.

It is with regard to the fourth question relating to the expression "is being," namely, whether the court, in viewing the past, can look back to the time before the child concerned was born, that the division of opinion between the Divisional Court and the Court of Appeal has arisen. The view of the Divisional Court can be summarised in this way. First, the expression "child" in section 1(2)(*a*) must be interpreted, in accordance with the definition of it contained in section 70(1), as meaning a person under the age of 14. Secondly, a child does not become a person until it is born. Thirdly, that being so, it was not permissible for the juvenile court, in considering whether any of the three continuing situations in respect of the child described in section 1(2)(*a*) existed, to look back to the time before it was born and before, therefore, it had become a person. Fourthly, without looking back at that earlier time, there was no material on which the juvenile court could find that any of the three continuing situations referred to existed.

The three members of the Court of Appeal, while arriving at the same result, did not, as I understand their judgments, proceed upon precisely the same grounds. Stephen Brown L.J. and Dillon L.J., on the one hand, appear to have founded their decision on the broad ground that to exclude consideration of the time before the child was born involved adopting too narrow an approach to the question whether any of the three continuing situations in respect of the child described in section 1(2)(*a*) existed. It was permissible for the juvenile court to look at that earlier time, and, having done so, it had ample material on which it could find that both of the first two continuing situations referred to existed. Woolf L.J., on the other hand, took the view that the juvenile court, in considering whether either of the first two continuing situations existed, had to ask itself two separate questions. The first question was, in the case of the first situation, whether the proper development of the child was being prevented or neglected, and, in the case of the second situation, whether the health of the child was being impaired or neglected. The second question, in either case, assuming an affirmative answer to the first, was whether that situation was avoidable, that is to say, whether it could have been avoided. In the view of Woolf L.J. it was not permissible for the juvenile court to look back at the time before the child was born in order to answer the first question; but it was permissible for it to do so in answering the second question. Proceeding in this way the juvenile court had material before it on which it could give affirmative answers to both questions.

In my opinion the provisions contained in section 1(2)(*a*) of the Act of 1969 must be given a broad and liberal construction which gives full effect to their legislative purpose. That purpose is to protect, among other ways through the medium of a care order, any child of whom it can be said, in the ordinary and natural meaning of the words used, either (i) that its proper development is being avoidably prevented or neglected, or (ii) that its health is being avoidably impaired or neglected, or (iii) that it is being ill-treated. Children for whom such protection is provided include children who are only a few weeks or even a few days old.

The child in the present case, having been born on 12 March 1985, was in hospital (for part of the time at least in intensive care) from that date until 19 May 1985, because she was suffering from symptoms caused by withdrawal from narcotic drugs. The point of time at which the process of protecting her was first put in motion was 23 April 1985, when the authority's social services department was granted authority to detain the child and take her to a place of safety, and that was accordingly the point of time as at which the juvenile court had to consider whether any of the continuing situations described in section 1(2)(*a*) existed. It found, and had ample material on which to find, that at that point of time, when the child was still in hospital, both the first and the second of those situations existed, that is to say (i) her proper development was being avoidably prevented and (ii) her health was being avoidably impaired. Each situation could have been avoided if the mother had not persisted in taking excessive narcotic drugs throughout her pregnancy. I see no reason why the juvenile court, in considering whether those situations existed, should not have looked back at the time before the child was born. At the relevant point of time for such consideration the child was six weeks old, and accordingly a person under the age of 14 years within the meaning of the expression "child" in section 70(1). The circumstance that the cause of the two situations in which the child was at that point of time, and the possibility of their having been avoided, dated back to the time before she was born appears to me to be immaterial. I can find nothing in section 1(2)(*a*) which would exclude taking into account those matters. Further it seems to me that the legislative purpose of section 1(2)(*a*) is best furthered by allowing such matters, in a case of this kind, to be taken into account.

It follows that I agree with the broad grounds of decision relied on by Stephen Brown L.J. and Dillon L.J. in the Court of Appeal and would dismiss the appeal.

There is one further matter with which I should deal before parting with this case. It may seem curious at first sight that, since both the child's guardian ad litem and the parents agree that a care order is necessary, they should have fought such a prolonged battle against its being made by the juvenile court. The explanation, however, is that all three believe that it would be better for the order to be made by the Family Division of the High Court in wardship proceedings under section 7 of the Family Law Reform Act 1969 than by the juvenile court under section 1 of the Children and Young Persons Act 1969. The reason why they believe that it would be better for the order to be made in wardship proceedings is that the High Court would then be able to exercise control over the authority in respect of the manner in which it implemented the order, whereas, if the order is made by the juvenile court, the High Court would not have that power: see *A. v. Liverpool City Council* [1982] A.C. 363 and *In re W. (A Minor) (Wardship: Jurisdiction)* [1985] A.C. 791. In particular they fear that the authority, if left to itself, may decide to programme the child for early adoption without their having an adequate opportunity to resist such a course being taken. I do not consider that it would be appropriate for your Lordships to express any view as to whether these beliefs and fears are

justified or not. The only question for decision on this appeal is whether the juvenile court had jurisdiction to make the care order which it did make, and I think that your Lordships should confine yourselves to the decision of that question.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Brandon of Oakbrook and Lord Goff of Chieveley. I agree with both of them that this appeal should be dismissed and with the reasons they have given for reaching this conclusion.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Brandon of Oakbrook and Lord Goff of Chieveley. I agree with both of them that this appeal should be dismissed and with the reasons they have given for reaching this conclusion.

LORD GOFF OF CHIEVELEY. My Lords, in cases under section 1(2)(*a*) of the Children and Young Persons Act 1969 (as amended), the magistrates have to ask themselves the questions: Is the proper development of the child being avoidably prevented or neglected? Or is its health being avoidably impaired or neglected? Or is it being ill-treated? If any one of these questions can properly be answered by them in the affirmative, at the time when they are asked to make their order, the primary condition for the making of the order is fulfilled.

The problem in the present case arises from the fact that the child suffered from withdrawal symptoms which necessitated her immediate admission to intensive care when she was born, because her mother took drugs before her child was born, during the period of her pregnancy. The question has therefore arisen whether, in such circumstances, it could be said that, at the time when the magistrates made their order, the child's proper development was being avoidably prevented or her health was being avoidably impaired. The submission that these questions must be answered in the negative was founded on the allegation that the time when the child's proper development was being avoidably prevented or her health was being impaired was when her mother was taking drugs during her pregnancy, and that this had ceased when the child was born; with the consequences that (1) the condition no longer existed when the order was made, and (2) during the time when the child's proper development was being avoidably neglected or her health was being avoidably impaired she was unborn and was not therefore a child within the meaning of that word as used in section 70(1) of the Act of 1969.

There is, I think, considerable force in this argument, as is demonstrated by the differing views taken by the courts below. In particular, we must avoid a construction of the Act which produces the result that any child, born suffering from the symptoms or effects of some avoidable ante-natal affliction, could be described, after its birth, as being a child whose proper development *is being* avoidably prevented or whose health *is being* avoidably impaired. The mere fact of a past avoidable prevention of proper development or impairment of health is

not, in my opinion, sufficient to fulfil the condition, even if there are symptoms or effects which persist or manifest themselves later.

I approach the matter as follows. The words "is being" are in the continuous present. So there has to be a continuum in existence at the relevant time, which is when the magistrates consider whether to make a place of safety order. In cases under the subsection, this may not be established by proof of events actually happening at the relevant time. In the nature of things, it may well have to be established, as continuing at that time, by evidence that (1) the relevant state of affairs had existed in the past, and (2) there is a likelihood that it will continue into the future. So it can be said that a child is being ill-treated if it has been cruelly beaten in the past, and there is a likelihood that it will continue to be cruelly beaten in the future. It is not enough that something has avoidably been done or omitted to be done in relation to the child in the past which has, for example, impaired its health, and that the symptoms or effects still persist at the relevant time; for it cannot be said in such circumstances that, at the relevant time, the child's health *is being* avoidably impaired—all that can be said is that its health has been avoidably impaired in the past.

I turn to the present case. Could it properly be said, at the time when the magistrates had to consider whether to make an order, that the proper development of the child was being avoidably prevented or that her health was being avoidably impaired? The magistrates could, first of all, look to the past and see that, by reason of the mother taking drugs during her pregnancy, the proper development of the child had been avoidably prevented or that her health had been avoidably impaired. In drawing this conclusion, I can see no reason why the magistrates should not be entitled to have regard to events which occurred before the child was born. They have, of course, to consider the question whether the relevant continuum exists, at the date when they are asked to make their order, with reference to a living child. But in looking for evidence whether such continuum then exists, there is no reason why they should not look at events which occurred while the child was still unborn or at the state of affairs at the child's birth, and it is contrary to common sense that they should be inhibited from doing so. Second, they could also say that, at the time when they considered whether to make an order, there was a likelihood that, by reason of the mother's drug addiction, the child's proper development would continue to be prevented or her health would continue to be impaired in the future, because the mother (and indeed the child's father, whom the mother has now married) were both still drug addicts, and parents suffering from that most unfortunate affliction, particularly a mother so addicted that she continued to take drugs throughout her pregnancy in the knowledge of the effect which this might have on her unborn child, could be said to be unlikely to be able to care for their child, so that there was a likelihood that, by reason of her mother's addiction to drugs, the child's proper development would continue to be avoidably prevented or her health would continue to be avoidably impaired in the future.

But let us take a different case. Suppose that a mother conceives a child when she is an alcoholic and is unable at first to give up drinking, despite the fact that she knows that this may have an adverse effect upon her unborn child. Shortly before the child is born, the full effect of her conduct is brought home to her; and she becomes a confirmed teetotaller. The child is born. Its proper development has indeed been prevented, or its health has indeed been impaired, by its mother's drinking. But if the case then came before the magistrates, I do not think that they could then properly conclude that, at the time when they were asked to make the order, the child's proper development was then *being* avoidably prevented, or that its health was then *being* avoidably impaired. By then, the damage would have been done: and there would be no likelihood of any further avoidable prevention of the child's development or impairment of its health. The same would have been true in the present case if the mother had, before the child was born, irrevocably given up the taking of drugs.

In the present case the magistrates looked only to the past history of the child, and studiously avoided considering the likelihood of prevention of the child's proper development or impairment of her health continuing into the future. I have little doubt that, in so doing, they misunderstood a judgment of my own in *Essex County Council v. T.L.R. and K.B.R.*, 143 J.P. 309. In that case, magistrates were asked to make a care order under section 1(2)(*a*) of the Act of 1969 solely on the basis of an event which was said to be going to happen in the future, i.e., that the father was going to take the children away from foster-parents to live with him in Northern Ireland after he had married a Chinese woman in Hong Kong. The magistrates refused to make an order, and a Divisional Court held that they were right to do so, because there was no relevant state of affairs then in existence which justified the making of an order, and the case fell within neither of the subsections of section 1 which specifically refer only to future events. However, when magistrates are considering whether there is a presently existing state of affairs, and there is evidence before them of events which indicate the existence of such a state of affairs in the past, the magistrates are entitled and, indeed, bound to consider whether at the time when they are considering making an order, there is an existing likelihood that the state of affairs revealed by those past events will continue into the future, in order to decide whether the necessary continuum exists at the relevant time.

Even so, since the magistrates held—and indeed there was no dispute—that the child in the present case was in need of care and control which she was unlikely to receive unless the court made a care order, it is, I consider, an inevitable inference that the magistrates considered that prevention of the child's proper development or impairment of her health was likely to continue into the future. Accordingly, I am of the opinion that the magistrates were entitled to make the order which they made. I too would therefore dismiss the appeal.

Appeal dismissed.

Costs of local authority to be paid out of legal aid fund, order to be suspended for four weeks to allow The Law Society to object if so desired.

Solicitors: Kingsford Dorman for Rowberry, Morris & Co., Reading; Sharpe, Pritchard & Co. for D. C. H. Williams, Reading; Gregory, Rowcliffe & Co. for Blandy & Blandy, Reading.

M. G.

[HOUSE OF LORDS]

REGINA . . . . . RESPONDENT

AND

HUNT (RICHARD) . . . . . APPELLANT

1986 Oct. 20, 21, 22; Dec. 4

Lord Keith of Kinkel, Lord Templeman, Lord Griffiths, Lord Mackay of Clashfern and Lord Ackner

Crime—Drugs—Unauthorised possession—Exceptions from prohibition against possession—Preparation containing small proportion of controlled drug—Burden of proof—Misuse of Drugs Act 1971 (c. 38), s. 5(1)(2)—Misuse of Drugs Regulations 1973 (S.I. 1973 No. 797), reg. 4(1), Sch. 1, para. 3 (as amended by Misuse of Drugs (Amendment) Regulations 1983 (S.I. 1983 No. 788), reg. 2)

Regulation 4(1) of the Misuse of Drugs Regulations 1973, as amended, provides that section 5(1) of the Misuse of Drugs Act 1971 "shall not have effect in relation to the controlled drugs specified in Schedule 1." Paragraph 3 of Schedule 1 to the Regulations provides:

> "Any preparation of medicinal opium or of morphine containing . . . not more than 0.2 per cent. of morphine . . . being a preparation compounded with one or more other active or inert ingredients in such a way that the opium or . . . the morphine, cannot be recovered by readily applicable means or in a yield which would constitute a risk to health."

Police officers found in the appellant's home a paper fold containing 154 milligrams of a white powder which, when analysed, was found to be morphine mixed with caffeine and

atropine. The appellant was charged under section 5(2) of the Act of 1971[1] with unlawful possession of a controlled drug, morphine. The prosecution called no evidence at his trial as to the proportion of morphine in the powder, and, at the end of the prosecution's case, the defence submitted that there was no case to answer. The judge ruled that there was a case to answer. The appellant then changed his plea to guilty, and a conviction of unlawful possession of morphine was recorded. The Court of Appeal (Criminal Division) dismissed the appellant's appeal against conviction.

On appeal by the appellant:—

Held, (1) (*per* Lord Keith of Kinkel, Lord Griffiths, Lord Mackay of Clashfern and Lord Ackner) that the burden of proving the guilt of an accused was on the prosecution save in the case of the defence of insanity and subject to any statutory exception; that such exception might be express or implied and the burden of proof might be placed on the accused whether the exception appeared in the same clause of the instrument in question as that creating the offence or in a subsequent proviso and whether the offence was triable summarily or on indictment, and would be discharged on the balance of probabilities; and that where a linguistic construction did not indicate clearly on whom the burden of proof should lie the court might look to other considerations to determine the intention of Parliament, such as the mischief at which the provision was aimed and practical considerations such as, in particular, the ease or difficulty for the respective parties of discharging the burden of proof (post, pp. 365B–D, 368C–F, 369G—370A, 371B–C, 374A–C, F–H, 376A–B, 378C, 379H—380F, 383E–G, 385A–C, G—386A).

Woolmington v. Director of Public Prosecutions [1935] A.C. 462, H.L.(E.); *Mancini v. Director of Public Prosecutions* [1942] A.C. 1, H.L.(E.); *Nimmo v. Alexander Cowan & Sons Ltd.* [1968] A.C. 107, H.L.(Sc.) and *Reg. v. Edwards* [1975] Q.B. 27, C.A. considered.

(2) Allowing the appeal, that, on its true construction, regulation 4(1) of the Misuse of Drugs Regulations 1973 dealt not with exceptions to what would otherwise be unlawful but with the definition of the essential ingredients of an offence; and that, as it was an offence to possess morphine in one form but not an offence to possess it in another form, it had been for the prosecution to prove that the morphine in the possession of the appellant had been in the prohibited form, which it had not done, and no burden had fallen on the appellant under regulation 4(1) and paragraph 3 of Schedule 1 (post, pp. 365B–D, 374B, 377B, D–F, 378H, 384G–H, 385G—386A).

Per Lord Mackay of Clashfern. This case emphasises the need for absolute clarity in the terms of the analyst's certificate founded on by the prosecution in cases of this sort (post, p. 378H).

Decision of the Court of Appeal (Criminal Division) [1986] Q.B. 125; [1986] 2 W.L.R. 225; [1986] 1 All E.R. 184 reversed.

The following cases are referred to in their Lordships' opinions:

Apothecaries' Co. v. Bentley (1824) 1 C. & P. 538; Ry. & M. 159

Davis v. Scrace (1869) L.R. 4 C.P. 172, D.C.

[1] Misuse of Drugs Act 1971, s. 5(1)(2): see post, pp. 363H—364A.

Gatland v. Metropolitan Police Commissioner [1968] 2 Q.B. 279; [1968] 2 W.L.R. 1263; [1968] 2 All E.R. 100, D.C.
Jayasena v. The Queen [1970] A.C. 618; [1970] 2 W.L.R. 448; [1970] 1 All E.R. 219, P.C.
Jelfs v. Ballard (1799) 1 Bos. & Pul. 467
John v. Humphreys [1955] 1 W.L.R. 325; [1955] 1 All E.R. 793, D.C.
M'Naghten's Case (1843) 10 Cl. & Fin. 200, H.L.(E.)
Mancini v. Director of Public Prosecutions [1942] A.C. 1; [1941] 3 All E.R. 272, H.L.(E.)
Nimmo v. Alexander Cowan & Sons Ltd. [1968] A.C. 107; [1967] 3 W.L.R. 1169; [1967] 3 All E.R. 187, H.L.(Sc.)
Reg. v. Burke (1978) 67 Cr.App.R. 220, C.A.
Reg. v. Cousins [1982] Q.B. 526; [1982] 2 W.L.R. 621; [1982] 2 All E.R. 115, C.A.
Reg. v. Edwards [1975] Q.B. 27; [1974] 3 W.L.R. 285; [1974] 2 All E.R. 1085, C.A.
Reg. v. Ewens [1967] 1 Q.B. 322; [1966] 2 W.L.R. 1372; [1966] 2 All E.R. 470, C.C.A.
Reg. v. MacPherson [1973] R.T.R. 157, C.A.
Rex v. Davies (1913) 8 Cr.App.R. 211, C.C.A.
Rex v. Jarvis (1756) 1 East 643n.
Rex v. Oliver [1944] K.B. 68; [1943] 2 All E.R. 800, C.C.A.
Rex v. Putland and Sorrell [1946] 1 All E.R. 85, C.C.A.
Rex v. Scott (1921) 86 J.P. 69
Rex v. Schama and Abramovitch (1914) 11 Cr.App.R. 45, C.C.A.
Rex v. Turner (1816) 5 M. & S. 206
Robertson v. Bannister [1973] R.T.R. 109, D.C.
Spieres v. Parker (1786) 1 Durn. & E. 141
Taylor v. Humphries (1864) 17 C.B.N.S. 539; 34 L.J.M.C. 1
Woolmington v. Director of Public Prosecutions [1935] A.C. 462, H.L.(E.)

The following additional cases were cited in argument:

Abrath v. North Eastern Railway Co. (1883) 11 Q.B.D. 440, C.A.
Baker v. Sweet [1966] Crim.L.R. 51, D.C.
Buckman v. Button [1943] K.B. 405; [1943] 2 All E.R. 82, D.C.
Jones v. Axen (1696) 1 Ld.Ray. 119
Nokes v. Doncaster Amalgamated Collieries Ltd. [1940] A.C. 1014; [1940] 3 All E.R. 549, H.L.(E.)
Reg. v. Gill [1963] 1 W.L.R. 841; [1963] 2 All E.R. 688, C.C.A.
Reg. v. Lobell [1957] 1 Q.B. 547; [1957] 2 W.L.R. 524; [1957] 1 All E.R. 734, C.C.A.
Reg. v. McPherson (1957) 41 Cr.App.R. 213, C.C.A.
Reg. v. Spurge [1961] 2 Q.B. 205; [1961] 3 W.L.R. 23; [1961] 2 All E.R. 688, C.C.A.
Reg. v. Warner [1969] 2 A.C. 256; [1968] 2 W.L.R. 1303; [1968] 2 All E.R. 356, H.L.(E.)
Rex v. Audley [1907] 1 K.B. 383
Rex v. James [1902] 1 K.B. 540
Rex v. Stone (1801) 1 East 639
Roberts v. Humphreys (1873) L.R. 8 Q.B. 483, D.C.
Steel v. Smith (1817) 1 B. & Ald. 94
Sweet v. Parsley [1970] A.C. 132; [1969] 2 W.L.R. 470; [1969] 1 All E.R. 347, H.L.(E.)
Thibault v. Gibson (1843) 12 M. & W. 88

A APPEAL from the Court of Appeal (Criminal Division).

This was an appeal by Richard Selwyn Russell Hunt by leave of the Court of Appeal (Criminal Division) (Robert Goff L.J., Beldam and Hutchison JJ.) [1986] Q.B. 125 from their judgment given on 23 October 1985 dismissing the appellant's appeal against his conviction at Lewes Crown Court (Judge Wingate Q.C.) on 26 February 1985 of possessing a controlled drug, contrary to section 5(2) of the Misuse of Drugs Act B 1971.

The facts are set out in the opinion of Lord Griffiths.

Kenneth Zucker Q.C., and *Geoffrey W. Greenwood* for the appellant. The fundamental issue of principle in this case is whether in trials on indictment of offences created by statute there is a further exception to C the rule stated in *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462, namely that the burden of proof rests on the prosecution subject to the defence of insanity and subject to any statutory exception and that it is not for the defendant to prove his innocence. By "statutory exception" the House of Lords meant express exceptions, not implied ones (see *per* Viscount Sankey L.C., at p. 481; *Mancini v. Director of* D *Public Prosecutions* [1942] A.C. 1, 11).

The Court of Appeal held that in relation to offences created by statute ordinary principles of construction applied to place a burden of proof on the defendant if the true construction of the statute required it: i.e., exceptions could be implicit as well as express.

The principal submission for the appellant will be that the rule stated in *Woolmington* applies to trials on indictment of offences created by E statute, that it is exhaustive and that the Court of Appeal were in error in this case and in of *Reg. v. Edwards* [1975] Q.B. 27, which preceded it and which really marked the departure from *Woolmington*.

The law prior to *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462 was that, apart from statutory exceptions, there were a number of common law exceptions to the rule that the burden of proof F was on the prosecution. (a) At common law on a charge of murder there was a long line of authority that it was for the defence to prove matters that would reduce murder to manslaughter or exculpate him. A similar approach was adopted with regard to manslaughter itself. (b) Insanity, in respect of which it was specifically said in *M'Naghten's Case* (1843) 10 Cl. & Fin. 200 that the burden was on the defence. (c) Where in relation to a statutory offence the burden had been held to lie on the G defence. There were three exceptions under this head: (1) An exception contained in the same clause of the Act that created the offence had to be negatived by the prosecution, but if the exception or proviso were in a subsequent clause of the statute, or, although in the same section, if it were not incorporated with the enabling clause by words of reference, it was a matter of defence: *Jones v. Axen* (1696) 1 Ld.Ray. 119; *Steel v. Smith* (1817) 1 B. & A. 94. (2) Where an act was prohibited unless done H pursuant to a stipulated licence or authority, the defendant had to prove that he possessed the necessary licence or authority: *Apothecaries' Co. v. Bentley* (1824) Ry. & M. 159; *Rex v. Scott*, 86 J.P. 69. (3) Under the Game Acts the defendant had to prove that he was qualified to keep

guns, bows, dogs, etc.: *Rex v. Turner* (1816) 5 M. & S. 206. No justification is given for exception (1) in the authorities. (2) and (3) are best seen as exceptions to (1). They involve matters peculiarly within the knowledge of the defendant.

In addition, there was a particular statutory exception in relation to summary trials only, namely that the burden was on the defendant of proving an exception, exemption, proviso, etc. in a statute: see the proviso to section 14 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43); now section 101 of the Magistrates' Courts Act 1980.

Woolmington clearly marked a departure from the law as it had been previously understood. That was recognised by Lord Devlin in *Jayasena v. The Queen* [1970] A.C. 618, 624–625. It will only be necessary to consider the common law prior to *Woolmington* if the House concludes that in relation to trials on indictment of offences created by statute the common law as it was understood prior to *Woolmington* still applies.

Since *Woolmington*, the rule laid down in that case has been rigorously applied to all common law defences, and it is difficult to see any reason why a different approach should be applicable where a matter of defence arises under a statute.

Following *Woolmington*, a distinction came to be emphasised between the legal or "persuasive" burden and an "evidential" burden: see *Reg. v. Gill* [1963] 1 W.L.R. 841. Though useful terms of convenience, they fall into quite different categories. The former is a burden of proof: beyond reasonable doubt if falling on the prosecution; on the balance of probabilities if falling on the defendant. The latter is not a burden of proof (see *per* Lord Devlin in *Jayasena v. The Queen,* at pp. 623E, 624C–E), nor even necessarily of adducing evidence. It merely entails that, before a jury can consider any specific defence to a charge, there must be evidence to support it, the onus remaining on the prosecution to negative such defence once raised. Such material may appear from the prosecution's own case (*Reg. v. McPherson* (1957) 41 Cr.App.R. 213, *per* Lord Goddard C.J., at p. 215), by cross-examination of the prosecution witnesses or by evidence, called on the defendant's behalf (*Reg. v. Gill* [1963] 1 W.L.R. 841, *per* Edmund Davies J., at p. 846). The principle that before the jury can consider any common law defence there must be evidence to support it but the burden of negativing it falls on the prosecution has been held since *Woolmington* to apply to all common law defences: *Reg. v. Gill* (duress); *Reg. v. Lobell* [1957] 1 Q.B. 547 (self-defence); *Reg. v. Spurge* [1961] 2 Q.B. 205 (mechanical defect); see also cases cited in *Phipson on Evidence*, 13th ed. (1982), p. 49, n. 63.

Subsequent to *Woolmington* in a number of cases it was held following earlier authorities that the burden of proof lay on a defendant to establish a defence based on the wording of a statute: e.g. *Rex v. Oliver* [1944] K.B. 68 (the burden is on a defendant to prove the existence of a licence to supply sugar); *Reg. v. Ewens* [1967] 1 Q.B. 322 (the burden is on the defendant to prove that possession of a drug was authorised) and *Reg. v. Edwards* [1975] Q.B. 27 (the burden is on a defendant to prove that he had a licence to sell intoxicating liquor). Until *Reg. v. Edwards* the ground for each decision was that the facts

relating to the defence were peculiarly within the knowledge of the defendant. In *Reg. v. Edwards* Lawton L.J. rejected that justification and held that an exception to the rule in *Woolmington* arose from common law rules as to pleading: see at p. 40.

Those cases, in placing a burden of proof (the "persuasive" burden), on the defendant were wrongly decided. (1) They were contrary to the principle laid down in *Woolmington*. (2) In so far as they relied on the facts relating to the defence afforded by statute being peculiarly within the knowledge of the defendant, such justification for placing the burden of proof on the defendant was rejected in relation to common law defences by the Court of Appeal in *Reg. v. Spurge* [1961] 2 Q.B. 205. There is no logical reason why it should not apply in the latter case but should in the former.

As to *Reg. v. Edwards*, the following comments are made. (1) The Court of Appeal failed to apply *Woolmington*, which represents the common law after 1935. If so, on any view the Court of Appeal was in error in applying the common law prior to *Woolmington*. (2) Lawton L.J. was in error in his view of the common law. The distinction between an exception in the enacting part of the law and one referred to in a subsequent proviso was maintained through the 19th century and referred to with approval in *Rex v. James* [1902] 1 K.B. 540 and *Rex v. Audley* [1907] 1 K.B. 383. (3) The proviso to section 14 of the Act of 1848 did not embody the common law. (4) The principle expressed by Lawton L.J. that there was a legal burden on the defendant to prove provisos, exceptions and the like was contrary to the cases regarding statutory exceptions decided since *Woolmington* which show that that burden is evidential only (*Reg. v. Burke* (1978) 67 Cr.App.R. 220 (an exemption); *Reg. v. MacPherson* [1973] R.T.R. 157 (an exception); *Reg. v. Cousins* [1982] Q.B. 526 (without lawful excuse)). (5) It would have been unnecessary for Parliament to have expressly placed the burden of proof on defendants in relation to matters excusing the defendant from liability. In particular, (i) section 47 of the Sexual Offences Act 1956 places the burden of proving exemptions under the Act on the person relying on them; (ii) by section 1(1) of the Prevention of Crime Act 1953 the burden of proving lawful authority or excuse rests on the defendant; and (iii) section 4(2) of the Homicide Act 1957 provides that a defendant shall prove that a killing was in pursuance of a suicide pact. (6) It would be illogical that in trials on indictment the onus of proof should rest throughout on the prosecution to negative common law defences which, if the law were codified, would appear as provisos, exemptions, excuses, etc., to the offence to which they were applicable and that a different rule should apply because the matter relied on by way of defence arises under statute.

For the common law prior to *Woolmington* and its relationship to section 14 of the Act of 1848, see *Chitty on Pleading*, 7th ed. (1844), vol. I, p. 246; *Archbold's Criminal Pleading*, 11th ed. (1849) (and cf. subsequent editions to 15th (1862); *Steel v. Smith* 1 B. & A. 94; *Thibault v. Gibson* (1843) 12 M. & W. 88; the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 14; *Taylor v. Humphries* (1864) 17 C.B.N.S. 539; *Davis v. Scrace* (1869) L.R. 4 C.P. 172; the Summary Jurisdiction

Act 1879, s. 39(2); *Roberts v. Humphreys* (1873) L.R. 8 Q.B. 483; *Rex v. James* [1902] 1 K.B. 540; *Rex v. Audley* [1907] 1 K.B. 383 and *Phipson on Evidence*, 7th ed. (1930) (the last edition prior to *Woolmington*), p.33.

The game law cases did not illustrate the rule: they were *exceptions* to it: see the Game Act 1670 (22 & 23 Car. 2, c. 25), s. 3; *Rex v. Jarvis* (1756) 1 East 643n; *Rex v. Stone* (1801) 1 East 639; *Rex v. Turner* 5 M. & S. 206 and *Abrath v. North Eastern Railway Co.* (1883) 11 Q.B.D. 440. The appellant does not say that these cases were wrongly decided: They were within the second exception at common law where the burden of proof was on the defendant.

Nimmo v. Alexander Cowan & Sons Ltd. [1968] A.C. 107 has no application to trials on indictment. (1) It was concerned with section 29(1) of the Factories Act 1961, a provision that related to safety legislation and created both civil and criminal liability. (2) Breach of section 29(1) is a purely summary offence, and the case turned in large measure on the construction of section 16(*d*) of the Summary Jurisdiction (Scotland) Act 1954. In *Reg. v. Edwards*, at p. 36E, Lawton L.J. held that the object of the English predecessor of that section (the proviso to section 14 of the Summary Jurisdiction Act 1848) was to apply the common law relating to exceptions and provisos to the new courts of summary jurisdiction created by the Act. Whatever may have been the position in 1848, the common law relating to trial on indictment is now that laid down in *Woolmington*. Section 16(*d*) of the Act of 1954 provides a statutory exception to the general principle that the onus of proof rests on the prosecution. (3) The general rule of construction in relation to criminal offences is not that stated in *Nimmo's* case by Lord Upjohn, at pp. 124G—125A, but that stated by Lord Reid in *Sweet v. Parsley* [1970] A.C. 132, 149E. (4) Lord Pearson in *Nimmo's* case, at p. 136E, stated the principle arising from section 16(*d*) and the corresponding English enactments. He was of the view, at p. 137A–E, that where the words "without reasonable excuse" were used in a statutory provision creating a criminal offence the burden was on the defendant to show that he had a reasonable excuse. (5) If the English equivalent of section 16(*d*) (section 101 of the Magistrates' Courts Act 1980) were held to apply to trials on indictment the principle stated in *Woolmington* would be drastically eroded: e.g., *Reg. v. Burke, Reg. v. MacPherson* and *Reg. v. Cousins* would have been wrongly decided and in many offences where it is taken for granted that the burden of disproving defences is on the prosecution the opposite would then be the case: see, e.g., the proviso to section 21(1) of the Theft Act 1968.

In relation to this issue there is no authority binding on the House and in the circumstances weight should be given to the opinion in the 11th Report of the Criminal Law Revision Committee, Evidence (General) (1972) (Cmnd. 4991), para. 140, that both on principle and for the sake of clarity and convenience in practice burdens on the defence should be evidential only for the reasons there given. [Reference was made to *Starkie on Evidence*, 2nd ed. (1833), vol. I, p. 352; *Taylor on Evidence*, 4th ed. (1864), vol. 1, p. 367; *Cross on Evidence*, 6th ed. (1985), p. 125; the Sexual Offences Act 1956, s. 3; the Prevention of

Crime Act 1953, s. 1(1); the Homicide Act 1957, s. 4(2); the Theft Act 1968, s. 21(1)(a)(b); the Indictments Act 1916, ss. 3(1), 8(1) and the Indictment Rules 1971 (S.I. 1971 No. 1253 (L.31)), rr. 5(1), 6.]

On the assumption that, contrary to the contentions advanced above, a burden of proof can rest on a defendant (and the relevant principle is that stated by Lawton L.J. in *Reg. v. Edwards* [1975] Q.B. 27, 40), the present case does not fall within that principle, as the Court of Appeal accepted [1986] Q.B. 125, 133.

If, contrary to the contentions advanced above, the relevant principles are to be found in *Nimmo v. Alexander Cowan & Sons Ltd.*, the Court of Appeal wrongly applied that case to place on the appellant the burden of proving that the powder found in his possession did not fall within paragraph 3 of Schedule 1 to the Misuse of Drugs Regulations 1973.

The Court of Appeal appears to have started from the premise that paragraph 4(1) of and Schedule 1 to the Regulations of 1973 created an "exception," but the mere fact that a provision in a statute is described as an "exception" does not of itself place the burden of proof that he is within the exception on a defendant: see the tests stated by Lord Pearson and Lord Wilberforce in *Nimmo's* case, at pp. 136E, 129G, 130C. Whatever test is appropriate, paragraph 4(1) of and Schedule 1 to the Regulations of 1973 do not provide for excuses or exemptions from liability under or a defence to section 5(1) of the Act of 1971. Schedule 1 sets out preparations containing controlled drugs that it is lawful to possess. It therefore goes to the definition or ambit of the offence. The burden must therefore be on the prosecution to prove that a preparation found in the defendant's possession does not fall within the Schedule.

The Court of Appeal held that, because the Regulations of 1973, e.g. by regulations 6 and 10, make it lawful for certain persons when acting in certain capacities or by reason of their professions to be in possession of controlled drugs and the burden would not be on the prosecution to negative such exceptions, the burden of proof should be consistent in all the exceptions introduced by the Regulations. In so holding, the Court of Appeal failed to recognise the essential distinction between regulation 4(1) and, e.g., regulations 6 and 10 in that the former applies to the nature of the substance itself found in the possession of a defendant and is universally applicable to determine whether its possession is lawful and therefore goes to the root of the offence whereas the latter relate to the qualifications of the individual possessor and do provide an exception from liability, i.e., an individual would have been in unlawful possession of a controlled drug were it not for the applicability of regulations 6 or 10 to that individual.

The Court of Appeal, purporting to follow *Nimmo v. Alexander Cowan & Sons Ltd.*, held that they were entitled to take particular considerations into account, namely that the prosecution would have to produce evidence from an analyst. The broader considerations that Lord Pearson in *Nimmo's* case, at p. 133A–B, said could be taken into account were the parties' respective means of knowledge and spheres of responsibility. The requirement to call evidence from an analyst, when such evidence is always easily available to a prosecution, is not a proper

consideration to be taken into account for concluding that the burden of proof lies on the defendant. In fact, if practical considerations are to be taken into account, they indicate that the burden of proof should be on the prosecution. In the vast majority of cases, the substances suspected of being a controlled drug found in the possession of a defendant would have been seized by the police. It will not have been analysed by the defendant, and the prosecution's case will be founded on an analyst's report. There will be no difficulty when the substance is a compound preparation for the analyst to determine whether it does or does not fall within Schedule 1. There is no provision for any part of such substance to be returned to the defendant or his legal advisers for analysis and it would require an order of the court for that to occur. In the instances given by the Court of Appeal where the prosecution's case is not supported by an analyst's report, i.e. an admission by the defendant or the destruction of the drug, the former would provide direct evidence of unlawful possession and in the latter case there would in any event have to be evidence arising from the circumstances that would raise a prima facie case that the defendant was in unlawful possession of a controlled drug.

The Court of Appeal were wrongly influenced by the gravity of the offence, including the fact that offences relating to the possession of controlled drugs are absolute [1986] Q.B. 125, 136D–E. The gravity of the offence is a ground for placing the burden of proof on the prosecution, not on the defendant.

The principles that apply in determining whether there is an evidential burden on the defendant are those stated by Lord Pearson and Lord Wilberforce in *Nimmo's* case, pp. 136E, 129G, 130C. For the like reasons as those set out above, no evidential burden rested on the appellant to adduce evidence that the preparation found in his possession came within paragraph 3 of Schedule 1. Alternatively, if there was an evidential burden upon him to raise an issue that it did so, that issue was raised by the prosecution's case itself. As, according to the analyst's certificate, the powder found in the appellant's possession contained morphine mixed with caffeine and atropine, the latter not being controlled drugs, the jury, if no further evidence had been adduced, would have been left in doubt as to whether or not the powder fell within paragraph 3 of Schedule 1.

Anthony Hacking Q.C. and *Michael Warren* for the Crown. The burden does fall on the defence in the circumstances set out in the point of law certified by the Court of Appeal as a point of general public importance, and in such circumstances the burden is one of persuasion as well as one of evidence. The Crown adopts what the Court of Appeal said [1986] Q.B. 125, 136E. In support of its submission it advances the following arguments.

(1) There is a correctly decided line of authority culminating in *Reg. v. Edwards* [1975] Q.B. 27 that holds that when a statute creates a criminal offence that prohibits the doing of a certain act subject to provisos, exceptions and similar exclusions the burden of proof that normally lies on the Crown shifts so that it is for the defendant to prove that he comes within such proviso, exception or exclusion. The burden

A on such a defendant is the persuasive (legal) burden as well as the evidential burden. The standard of proof is the balance of probabilities: see *Reg. v. Edwards* and the cases cited therein.

(2) The Act of 1971 (particularly section 5(1) and (2) in relation to this appeal) is on its true construction such a statute as is referred to in (1) above for the following reasons. (a) It comes within the definition of such statutes set out in the judgment of Lawton L.J. in *Reg. v. Edwards,* B at p. 40A. The prohibited act is the possession of morphine, and the appropriate saving of "specified circumstances" is that set out in regulation 4(1) of the Regulations of 1973, namely the possession of morphine when the morphine is in the quantity and form set out in the Misuse of Drugs (Amendment) Regulations 1983, Sch. 1, para. 3.

(b) If the relevant section (section 5(1) and (2)) of the Act and the C relevant regulation (regulation 4(1) of the Regulations of 1973) do not entirely accord with Lawton L.J.'s definition (see the doubts expressed by the Court of Appeal, at pp. 133–134), Lawton L.J. did not intend to create a narrow definition: see later in his judgment, at p. 40B: "If the true construction is that the enactment prohibits the doing of acts subject to provisos, exemptions and the like, then the prosecution can rely upon the exception [as to the general rule about the burden of D proof]." The Act of 1971 comes within this broader definition.

(c) In any event, the Act of 1971 (particularly section 5(1) and (2)) and the Regulations fall to be construed on broader principles of construction and on such broader principles come within the line of authorities referred to in (1) above. Such broader principles of construction would include: (i) the mischief at which the statute was E aimed; (ii) considerations of public policy (as to (i) and (ii) see *Nimmo v. Alexander Cowan & Sons Ltd.* [1968] A.C. 107); (iii) the requirement of consistency (that if some of the regulations created by the Secretary of State under section 7 of the Act shift the burden on to the defence then they all should) (see *Rex v. Scott* (1921) 86 J.P. 69); and (iv) present pleading practice: see section 81 of the Magistrates' Courts Act 1952 and rule 6(*b*) of the Rules of 1971.

F (3) Further, the line of authorities referred to in (1) does not require that the defendant should have or be presumed to have peculiar knowledge of the facts necessary to prove that he comes within the exception before the burden shifts to him (*Reg. v. Edwards*).

(4) The burden on the defendant in these circumstances is persuasive as well as evidential (*Reg. v. Edwards*).

G As to taking into account inter alia the mischief at which the statute is aimed and considerations of public policy; see *Reg v. Warner* [1969] 2 A.C. 256 and *Nokes v. Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014, 1022 (Viscount Simon L.C.). The words following "subject to . . ." in section 5 are a matter of defence because they are not an integral part of the offence: see section 7(1)(*a*)(*b*). The prosecution has to prove possession of a controlled drug in the *Warner* sense; if it does H so, the onus shifts: see *Sweet v. Parsley* [1970] A.C. 132, *per* Lord Reid, at pp. 148–149. It is unsatisfactory that the prosecution did not identify the proportion of morphine, but that is not fatal to the Crown's submission on construction. [Reference was made to *Reg. v. Ewens*

[1967] 1 Q.B. 322; *Buckman v. Button* [1943] K.B. 405; *John v. Humphreys* [1955] 1 W.L.R. 325; *Baker v. Sweet* [1966] Crim.L.R. 51; *Gatland v. Metropolitan Police Commissioner* [1968] 2 Q.B. 279 and regulation 4(2)(*b*) of the Misuse of Drugs Regulations 1985 (S.I. 1985 No. 2066).]

The principle in section 101 of the Magistrates' Courts Act 1980 should be held to apply to all proceedings, on indictment as well as summary, so long as that is not contrary to *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462. *Woolmington* is silent as to the ambit of "any statutory exception," and neither the report of the argument nor the speeches contain any analysis of or reference to the meaning of those words. The case was concerned with common law offences and the burden of proof in relation thereto and not statutory offences. As to *Mancini v. Director of Public Prosecutions* [1942] A.C. 1, that was a case of murder, a common law offence, and there was no analysis in the argument or the speeches of "statutory exception."

As a matter of principle, it is unobjectionable for the House now to construe *Woolmington* and conclude that both express and implied statutory exceptions are within its ambit. Any resulting uncertainty in the criminal law, more particularly in a prosecution for the unlawful possession of a controlled drug, is cured by the House deciding that it is for the prosecution to prove possession of a controlled drug and, if it does so, for the defendant to establish a defence before the jury on the balance of probabilities based on the exceptions and exemptions under the Act and the Regulations. Both *Reg. v. Edwards* and the present case come within *Woolmington*.

As to *Reg. v. Edwards*, the Court of Appeal there rightly decided that there were three categories of exception to the rule in *Woolmington*: (i) insanity; (ii) express statutory provision; (iii) implied statutory provision. The Crown makes no submissions regarding Lawton L.J.'s historical analysis save that what Lawton L.J. was seeking to deal with was the appellant's point that it was only when facts were peculiarly within the defendant's knowledge that the burden of proof shifted to the defendant. The Court of Appeal in *Reg. v. Edwards* were right to say that *Woolmington* was not restricted to insanity.

As to section 7(1)(*a*)(*b*), there is nothing in the Act to indicate that any of the exceptions, if that is what they are, should be treated differently. The House should not construe the wording of the regulation as affecting the way in which they have to be proved. Parliament in section 5 did not draw any distinction between (*a*) and (*b*). The Court of Appeal in *Reg. v. Edwards* were right as to this.

The recommendations of the 11th Report of the Criminal Law Revision Committee, Evidence (General) (1972) (Cmnd. 4991) have so far been ignored by Parliament: see, for example, clause 5 of the committee's draft bill, which is based on the proposition that the accused is, in certain circumstances, to be called on by the court to give evidence at the trial.

The Crown does not accept the appellant's three essential submissions, for the reasons given. As the Court of Appeal said [1986] Q.B. 125, 136c: "On the other hand, it will only be in rare cases . . ." This was a

A "rare" case, and the burden should rest on the appellant to bring himself within the exception or exemption on which he relies. If the burden here was evidential only, it was not discharged.

Warren following. As to whether there would be difficulty for the prosecution in proving the proportion of morphine: (i) when the morphine is a mixed drug with known constituents, in tablet or powder form, the ingredients are compressed but the powder retains its B constituent parts so that they can be identified (there is no chemical reaction); (ii) there would be delay in cases involving powders containing morphine, and especially cocaine, although the proportion or amount can always be ascertained.

The Act on its face appears to draw no distinction between any of the regulations, in that some are to be proved one way, some another. C It is accepted that in cases of innocent possession it should be for the prosecution to establish the offence, but where the possession is plainly improper the burden should be on the defendant.

Zucker Q.C. in reply. As to whether this was a mixture or a compound, the case was argued below on the basis that it fell within Schedule 1.

On construction, section 2 of the Act of 1971 is a definition section D alone.

Poppy-straw is by Schedule 2 to the Act of 1971 a Class A drug. But by regulation 4(2) of the Regulations of 1973 it is exempted from the provisions of section 4(1) and 5(1) of the Act of 1971. The burden cannot be on a defendant to prove that a substance in his possession is not poppy-straw. Regulation 4(1) must be construed in the same way as E regulation 4(2). Regulations 4(1) and (2) deal with matters that go to the substance of the offence and not to matters of defence.

Many of the authorities cited by the Crown relate to summary offences as to which different provisions apply.

The provisions in the game law cases were very similar to those of regulation 6 of the Regulations of 1973. If the game law cases arose again, in the light of *Woolmington* the evidential burden would be on F the defence, rather than the legal burden. *Woolmington* overruled the game law cases, which took a very techincal approach, to that extent. The situation today is entirely changed. Since *Woolmington*, in all these cases the legal burden is on the prosecution.

Their Lordships took time for consideration.

G

Lord Keith of Kinkel. My Lords, I have had the opportunity of considering in draft the speech prepared by my noble and learned friend Lord Griffiths. I agree with it, and for the reasons he gives would allow the appeal and quash the conviction.

Lord Templeman. My Lords, by the Misuse of Drugs Act 1971, H morphine was classified as a controlled drug. By section 5:

> "(1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession. (2) Subject to section 28 of this

Act and subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above."

By section 5(4) if "it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to prove— . . ." in certain defined circumstances that he intended to destroy the drug or to deliver the drug into lawful custody and that he took all reasonable steps to carry out his intention. By section 7(1) the Secretary of State was given power by regulation to:

"(*a*) except from section . . . 5(1) of this Act such controlled drugs as may be specified in the regulations; and (*b*) make such other provision as he thinks fit for the purpose of making it lawful for persons to do things which . . . it would otherwise be unlawful for them to do."

By section 28, in proceedings for an offence under section 5(2), the accused shall be acquitted "if he proves that he neither believed nor suspected nor had reason to suspect that the substance involved in the alleged offence was a controlled drug."

By regulation 4 of and Schedule 1 to the Misuse of Drugs Regulations 1973 (S.I. 1973 No. 797) made pursuant to section 7 of the Act, the Secretary of State directed that section 5(1) "shall not have effect in relation to" any preparation of morphine containing "not more than 0.2 per cent. of morphine calculated as anhydrous morphine base" and compounded in such a way that the morphine cannot readily be recovered and does not constitute a risk to health. Regulation 6 authorises certain persons to have a controlled drug in their possession, notwithstanding the provisions of section 5(1). The specified persons included a constable, a post office employee and a customs officer acting in the course of their respective occupations.

The onus of proving possession of a drug which by section 5(1) it is unlawful to possess lies on the prosecution. If that onus is discharged, it is for the accused to prove lawful authority under regulation 6, or to establish the defence of lawful intention under section 5(4), or the defence of lack of knowledge under section 28. In my opinion the Act creates a statutory offence which must be proved by the prosecution and makes available statutory defences which must be proved by the accused.

The appellant was accused of "possessing a controlled drug, contrary to section 5(2) of the Misuse of Drugs Act 1971." The evidence established possession of a powder containing "morphine mixed with caffeine and atropine." If the powder contained not more than 0.2 per cent. of morphine, calculated and compounded in the manner specified in the regulations, then the accused did not possess a controlled drug "contrary to section 5(2)." The prosecution only tendered facts which might or might not amount to an offence.

In these circumstances, the decision of this House in *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462 is not relevant. An accused may be convicted of a criminal offence if he commits an unlawful act with the requisite state of mind. *Woolmington* reaffirmed that in the absence of statutory provisions to the contrary the prosecution

must not only prove the act by direct or circumstantial evidence but must also prove the state of mind by evidence or by inference from fact. The Act of 1971 is inconsistent with any duty on the prosecution save the duty of proving the unlawful act, namely, possession of a controlled drug contrary to section 5(2). A restricted defence is accorded to a particular state of mind, but the onus of proving that defence, and other defences defined by the Act and the Regulations, lies with the accused. Another statute may preserve common law defences or create statutory defences and may doubtfully provide for the onus of proof; the effect of *Woolmington* depends on the construction of the statute.

The present appeal is not concerned with defences. By section 5(2) it is an offence to be in possession of a controlled drug in contravention of section 5(1). Possession of a powder containing not more than 0.2 per cent. of morphine based and compounded in the manner specified in regulation 4 does not contravene section 5(1) and therefore does not contravene section 5(2). Possession of a powder which contains morphine and does not comply with the conditions specified by regulation 4 contravenes section 5(1) and section 5(2). The prosecution only proved possession of a powder containing morphine. The appellant was therefore entitled to be acquitted.

Lord Griffiths. My Lords, on 26 February 1985 in the Crown Court at Lewes, the appellant, Richard Selwyn Russell Hunt, pleaded not guilty to an indictment charging him with possessing a controlled drug contrary to section 5(2) of the Misuse of Drugs Act 1971, the particulars of the offence being that he on 13 July 1984, at Eastbourne in the county of East Sussex, unlawfully had in his possession a controlled drug, namely 154 milligrams of a powder containing morphine, a Class A drug.

The prosecution called two police officers who gave evidence that on 13 July 1984 they executed a search warrant at the appellant's home and there found, under an ashtray in the bedroom, a paper fold containing a white powder. The appellant told the police that he had bought the powder in Shaftesbury Avenue and that it was amphetamine sulphate. The only other evidence for the prosecution was contained in the report of an analyst which was by agreement read to the jury. The report showed that the powder was not amphetamine sulphate and that it contained morphine. The report read:

> "On 19 July 1984 the following sealed item was received at the laboratory from Sussex Police, Eastbourne: RSE.1 Paper fold with powder. The paper fold, item RSE.1, contained 154 milligrams of off-white powder. This powder was found to contain morphine mixed with caffeine and atropine. Morphine is a controlled drug within the Misuse of Drugs Act 1971, Part I of Schedule 2 (Class A drugs). Caffeine and atropine are not controlled under the Misuse of Drugs Act 1971."

At the close of the prosecution case counsel for the appellant submitted that there was no case to answer. In order to understand the basis of that submission it is necessary to set out the relevant statutory

provisions which I take from the judgment of the Court of Appeal [1986] Q.B. 125, 129-130:

> "The appellant was charged with an offence under section 5(2) of the Misuse of Drugs Act 1971. Section 5(1) and (2) provides: '(1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession. (2) Subject to section 28 of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.' The expression 'controlled drug' is defined in section 2(1)(*a*) of the Act, which provides that in the Act: '(*a*) the expression "controlled drug" means any substance or product for the time being specified in Part I, II or III of Schedule 2 to this Act; . . .' Part I of Schedule 2 is concerned with Class A drugs. Paragraph 1 of Part I contains a list of 'substances or products,' including morphine. Paragraph 5 specifies 'Any preparation or other product containing a substance or product for the time being specified in any of paragraphs 1 to 4 above.' It follows that the powder of which the appellant was found to be in possession was a controlled drug by virtue of being a preparation or other product containing morphine.
>
> "It is to be observed that section 5(1) of the Act of 1971 is expressed to be 'Subject to any regulations under section 7 of this Act.' Section 7(1) of the Act provides: '(1) The Secretary of State may by regulations—(*a*) except from section 3(1)(*a*) or (*b*), 4(1)(*a*) or (*b*) or 5(1) of this Act such controlled drugs as may be specified in the regulations; and (*b*) make such other provision as he thinks fit for the purpose of making it lawful for persons to do things which under any of the following provisions of this Act, that is to say sections 4(1), 5(1) and 6(1), it would otherwise be unlawful for them to do.'
>
> "In 1973, there came into force the Misuse of Drugs Regulations of that year (S.I. 1973 No. 797), made in pursuance of various sections of the Act of 1971, including section 7. Part II of the Regulations is headed 'Exemptions from certain provisions of the Misuse of Drugs Act 1971,' and contains regulations 4 to 13 inclusive. For present purposes, the regulation which is of immediate importance is regulation 4(1) which provides: '(1) Sections 3(1) and 5(1) of the Act (which prohibit the importation, exportation and possession of controlled drugs) shall not have effect in relation to the controlled drugs specified in Schedule 1.' The amended Schedule 1 to the Regulations, which was in force at the relevant time [by virtue of the Misuse of Drugs (Amendment) Regulations 1983], is headed as follows: 'Controlled drugs excepted from the prohibition on importation, exportation and possession and subject to the requirements of regulation 23.' The Schedule consists of nine paragraphs. Each paragraph specifies a particular controlled drug in the nature of a preparation or powder or mixture. The relevant paragraph for present purposes is paragraph 3, which reads: 'Any preparation of medicinal opium or of morphine containing (in either

case) not more than 0.2 per cent. of morphine calculated as anhydrous morphine base, being a preparation compounded with one or more other active or inert ingredients in such a way that the opium or, as the case may be, the morphine, cannot be recovered by readily applicable means or in a yield which would constitute a risk to health.'

"It follows, therefore, that a controlled drug, being a preparation as described in paragraph 3, is a controlled drug excepted from the prohibition on possession contained in section 5 of the Act of 1971. It was the submission of counsel for the appellant at the trial that there was no case to answer because the prosecution had called no evidence as to the proportion of morphine contained in the powder found in the appellant's possession, or to the effect that the powder was not compounded as specified in paragraph 3 of Schedule 1 to the Regulations, and that it was not therefore open to the jury to hold, on the evidence, that the appellant was unlawfully in possession of a controlled drug contrary to section 5(2) of the Act of 1971."

The judge ruled against the submission. The appellant changed his plea to guilty and after being formally convicted by the jury he was sentenced to three months' imprisonment suspended for two years.

The judge did not give reasons for rejecting the submission of no case to answer but it is apparent from the discussion between the judge and counsel during the course of the submission that the judge rejected the submission because he was of opinion that Schedule 1 only applied to possession by such persons as doctors, dentists, veterinary surgeons and pharmacists. For the reasons given by the Court of Appeal this was an erroneous view of the scope of the regulations and the prosecution do not seek to uphold the construction of the regulations adopted by the trial judge.

The Court of Appeal, however, concluded that the ruling that there was a case to answer was correct, albeit it had been made for the wrong reason. The unchallenged evidence of the prosecution established that the appellant had had morphine in his possession, and in these circumstances the Court of Appeal held that if the appellant wished to escape conviction the burden lay upon him to prove on the balance of probability that the preparation of morphine fell within the relevant exception contained in the Regulations. As it was obvious that the appellant neither intended to nor could discharge this burden of proof, the Court of Appeal upheld the conviction.

The Court of Appeal gave leave to appeal to your Lordships' House and certified the following point of law of general public importance:

"Whether, in a prosecution for possession of a preparation or product containing morphine under section 5 of the Misuse of Drugs Act 1971, where the morphine is of an unspecified amount and compounded with other ingredients, and where the defence seeks to rely upon the exception to the said section 5 set out in regulation 4(1) of and paragraph 3 of Schedule 1 to the Misuse of Drugs Regulations 1973 (as amended), the burden falls upon the

defence to show that the said preparation or product comes within the said exception." A

The appellant challenges the decision of the Court of Appeal by two entirely distinct arguments. It is submitted that on the true construction of the Act and the Regulations the Court of Appeal were wrong to hold that the burden was upon the defendant to prove that the powder fell within Schedule 1 to the Regulations—an argument depending upon a B close consideration of this particular legislation. But the appellant also raises an argument of far wider ranging significance based upon the decision of this House in *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462 and involving the submission that the leading case of *Reg. v. Edwards* [1975] Q.B. 27 was wrongly decided by the Court of Appeal.

I propose first to consider the argument based upon *Woolmington v. Director of Public Prosecutions*. The starting point is the celebrated passage in the speech of Viscount Sankey L.C., at pp. 481–482: C

> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, D at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the E guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The appellant submits that in using the phrase "any statutory exception" Lord Sankey L.C. was referring to statutory exceptions in which Parliament had by the use of express words placed the burden of proof on the accused, in the same way as the judges in *M'Naghten's* F *Case* (1843) 10 Cl. & Fin. 200 had expressly placed the burden of proving insanity upon the accused. There are, of course, many examples of such statutory drafting of which a number are to be found in this Act—see section 5(4): "In any proceedings for an offence under subsection (2) above in which it is proved that the accused had a controlled drug in his possession, it shall be a defence for him to G prove—. . ."—see also section 28(2)(3). Examples in other Acts are to be found conveniently collected in *Phipson on Evidence*, 13th ed. (1982), p. 51, note 68.

The appellant also relies upon a passage in the speech of Viscount Simon L.C. in *Mancini v. Director of Public Prosecutions* [1942] A.C. 1 in which he said, at p. 11:

> "*Woolmington's* case is concerned with explaining and reinforcing H the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is a reasonable doubt, the prisoner should

have the benefit of it. The rule is of general application in all charges under the criminal law. The only exceptions arise, as explained in *Woolmington's* case, in the defence of insanity and in offences where onus of proof is specially dealt with by statute."

It is submitted that the use of the word "specially" indicates that Lord Simon L.C. considered that the reference in *Woolmington* [1935] A.C. 462 was limited to express statutory burdens of proof.

From this premise, it is argued that as it is well settled that if a defendant raises any of the common law defences such as accident, self-defence, provocation or duress and there is evidence to support such a defence the judge must leave it to the jury with a direction that the burden is on the prosecution to negative that defence, so it must follow that if a defendant raises any statutory defence the same rule must apply, and provided there is evidence to support such a defence the burden lies on the prosecution to negative it, the only exceptions to this rule being those cases in which the statute has by express words placed the burden of proving the defence upon the defendant.

However, in *Woolmington* the House was not concerned to consider the nature of a statutory defence or upon whom the burden of proving it might lie. The House was considering a defence of accident to a charge of murder and were concerned to correct a special rule which appeared to have emerged in charges of murder whereby once it was proved that the defendant had killed the deceased a burden was held to lie upon the defendant to excuse himself by proving that it was the result of an accident or that he had been provoked to do so or had acted in self-defence. This in effect relieved the prosecution of the burden of proving an essential element in the crime of murder, namely the malicious intent and placed the burden upon the accused to disprove it. It was this aberration that was so trenchantly corrected by Lord Sankey L.C. in the passage already cited [1935] A.C. 462, 481–482. In *Mancini* the House dealt with the duty of the judge to lay before the jury any line of defence which the facts might reasonably support and they also dealt with the particular nature of the defence of provocation. In neither appeal was the House concerned with a statutory defence and no argument was addressed on the nature or scope of statutory exceptions.

Before the decision in *Woolmington* [1935] A.C. 462 there had been a number of cases in which in trials on indictment the courts had held that the burden of establishing a statutory defence fell upon the defendant although the statute did not expressly so provide: see for example *Rex v. Turner* (1816) 5 M. & S. 206, a decision under the Gaming Acts, and *Apothecaries' Co. v. Bentley* (1824) 1 C. & P. 538 and *Rex v. Scott* (1921) 86 J.P. 69, decisions in which it was held that the defendant had the burden of proving that he was licensed to perform an otherwise prohibited act.

I cannot accept that either Viscount Sankey L.C. or Lord Simon L.C. intended to cast doubt on these long-standing decisions without having had the benefit of any argument addressed to the House on the question of statutory exceptions. I am, therefore, unwilling to read the reference to "any statutory exception" in *Woolmington*, at p. 481, in the

restricted sense in which the appellant invites us to read it. It is also to be observed that Lord Devlin in *Jayesena v. The Queen* [1970] A.C. 618, a decision of the Privy Council, commenting upon *Woolmington* said, at p. 623:

> "The House laid it down that, save in the case of insanity or of a statutory defence, there was no burden laid on the prisoner to prove his innocence and that it was sufficient for him to raise a doubt as to his guilt."

Lord Devlin does not appear to restrict a statutory defence to one in which the burden of proof is expressly placed upon the defendant.

In *Reg. v. Edwards* [1975] Q.B. 27, the defendant had been convicted in the Crown Court of selling intoxicating liquor without a justices' licence contrary to section 160(1)(*a*) of the Licensing Act 1964. Section 160(1)(*a*) provides:

> "Subject to the provisions of this Act, if any person—(*a*) sells or exposes for sale by retail any intoxicating liquor without holding a justices' licence or canteen licence authorising him to hold an excise licence for the sale of that liquor . . . he shall be guilty of an offence under this section."

The prosecution had called no evidence that the defendant did not have a licence and he appealed on the ground that the burden was on the prosecution to establish the lack of a licence. The Court of Appeal held that the burden was on the defendant to prove that he held a licence and that as he had not done so he was rightly convicted.

After an extensive review of the authorities the Court of Appeal held that the same rule applied to trials on indictment as was applied to summary trial by section 81 of the Magistrates' Courts Act 1952 which provided:

> "Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification."

(Section 81 of that Act has now been repealed and re-enacted in identical language in section 101 of the Magistrates' Courts Act 1980.)

A study of the old cases and practitioners' books led the court to conclude that when Parliament established a new system of summary jurisdiction by the Summary Jurisdiction Act 1848 (Jervis's Act) (11 & 12 Vict. c. 43), and enacted in section 14, which deals with proceedings on the hearing of complaints and informations, the following proviso:

> "Provided always, that if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed, it shall not be

> necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same"

they were there stating the common law rule as to proof that the judges then applied to trials on indictment.

Mr. Zucker in a most interesting argument has challenged that conclusion and submitted that the common law rule at that time was that an exception contained in the same clause of the Act which created the offence had to be negatived by the prosecution but if the exception or proviso were in a subsequent clause of a statute or, although in the same section, were not incorporated with the enabling clause by words of reference it was a matter of defence. From this general rule Mr. Zucker submits that there were but two exceptions, namely, the burden on a defendant under the gaming laws to show that he was qualified to keep guns, bows, dogs, etc., and, secondly, that where an act was prohibited unless done pursuant to a stipulated licence or authority the defendant had to prove that he possessed the necessary licence or authority.

The authorities certainly show that a rule of pleading had evolved by the beginning of the last century, and probably well before that, in the form of the general rule stated by Mr. Zucker. One of the more celebrated statements of the rule is Lord Mansfield C.J.'s dictum in *Rex v. Jarvis* (1756) 1 East 643, 645n.:

> "For it is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them."

However, as Mr. Zuckerman demonstrates in his learned article "The Third Exception to the *Woolmington* Rule" (1976) 92 L.Q.R. 402 the judges did not always regard the rules of pleading and the rules as to the burden of proof as being the same. In *Spieres v. Parker* (1786) 1 Durn. & E. 141 Lord Mansfield C.J. said, at p. 144, that the prosecutor must "negative the exceptions in the enacting clause, though he threw the burden of proof upon the other side." And in *Jelfs v. Ballard* (1799) 1 Bos. & Pul. 467, 468 Buller J. said: "The plaintiff must state in his scire facias everything that entitles him to recover; but it is a very different question what is to be proved by one party and what by the other."

Sometimes, however, the judges do appear to have applied the old pleading rules to determine the burden of proof. In *Taylor v. Humphries* (1864) 17 C.B.N.S. 539, a publican was charged with opening his premises on a Sunday before 12.30 in the afternoon otherwise than for the refreshment of travellers. The question for the court was upon whom the burden of proof lay to show that those found drinking in the premises at 11.20 in the morning were "travellers." In the course of giving judgment Erle C.J., referring to the argument on behalf of the publican, said, at p. 549:

"He further contended, that, as the exception of refreshment to a traveller is contained in the clause creating the prohibition, the burden of proving that the prohibition has been infringed, and that the case is not within the exception, is cast on the informer . . . In this argument we think the appellant is well founded, and that the statute ought to be construed on the principles that he has contended for."

In *Davis v. Scrace* (1869) L.R. 4 C.P. 172 a publican had been prosecuted under the Metropolitan Police Act 1839 (2 & 3 Vict. c. 47) for selling liquor before one in the afternoon on a Sunday. The Act provided, by section 42:

"no licensed victualler or other person shall open his house within the metropolitan police district for the sale of wine, spirits [etc.] on Sundays, Christmas Day, and Good Friday before the hour of one in the afternoon, except refreshment for travellers."

The court held that they were bound to follow *Taylor v. Humphries*, 17 C.B.N.S. 539. Brett J. said, at pp. 176-177:

"It is quite impossible to distinguish this case from *Taylor v. Humphries* . . . They seem to have held that, though the word 'except' is used in 11 & 12 Vict. c. 49, s. 1, it is not in truth an exception within the meaning of the proviso in section 14 of 11 & 12 Vict. c.43 [Summary Jurisdiction Act 1848] and that therefore that proviso had no application to the case in hand. I think we must adopt the same construction here."

It seems likely that these cases played their part in leading Parliament to repeal section 14 of the Act of 1848 and to replace it by section 39(2) of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) which was in substantially the same language as the present section 101 of the Act of 1980. As Lord Pearson pointed out in *Nimmo v. Alexander Cowan & Sons Ltd.* [1968] A.C. 107, Parliament was here emphasising that it was the substance and effect as well as the form of the enactment that mattered when considering upon whom it was intended that the burden of proof should lie under any particular Act.

It seems to me that the probabilities are that Parliament when it enacted section 14 of the Act of 1848 was intending to apply to summary trial that which they believed to be the rule relating to burden of proof evolved by the judges on trials on indictment. It seems unlikely that Parliament would have wished to introduce confusion by providing for different burdens of proof in summary trials as opposed to trials on indictment. Looking back over so many years, this must, to some extent, be speculation and I bear in mind that whereas the defendant could give evidence on his own behalf in a summary trial it was not until 1898 that he was allowed to do so in a trial on indictment which might be a reason for placing a heavier burden of proof on the prosecution in trials on indictment.

However, my Lords, the common law adapts itself and evolves to meet the changing patterns and needs of society; it is not static. By the time the Act of 1879 was passed there were already many offences that

were triable both summarily and on indictment. This list of offences has been growing steadily and the very crime with which we are concerned in this appeal is such an example. It is conceded that in the case of exceptions within the meaning of section 101 of the Act of 1980 the burden of proving the exception has been specifically placed upon the defendant. The law would have developed on absurd lines if in respect of the same offence the burden of proof today differed according to whether the case was heard by the magistrates or on indictment. I observe that there would be no possibility of presenting such a submission in respect of a crime triable in Scotland for the Criminal Procedure (Scotland) Act 1975, by sections 66 and 312(*v*), applies the same rule as to the burden of proof in respect of exceptions to both trials on indictment and summary trials. Although the language of sections 66 and 312(*v*) is slightly different from section 101 of the Act of 1980 it is to the like effect.

There have been a number of cases considered by the Court of Appeal since *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462 concerning the burden of proof in licensing cases both on indictment and on summary trial. There is no indication in any of these cases that the court considered that there should be any difference of approach to the burden of proof according to whether the case was tried summarily or on indictment: see *Rex v. Oliver* [1944] K.B. 68, *Rex v. Putland and Sorrell* [1946] 1 All E.R. 85, *John v. Humphreys* [1955] 1 W.L.R. 325, *Robertson v. Bannister* [1973] R.T.R. 109; see also *Reg. v. Ewens* [1967] 1 Q.B. 322 in which it was held that the Drugs (Prevention of Misuse) Act 1964 on its true construction placed an onus on the defendant to show that he was in possession of a prohibited drug by virtue of the issue of a prescription by a duly qualified medical practitioner.

Mr. Zucker relied upon three recent decisions of the Court of Appeal which he submitted support his submission that a statutory defence only places an evidentiary burden on the defendant to raise the defence and that if this is done the burden remains on the prosecution to negative the defence. They are *Reg. v. Burke* (1978) 67 Cr.App.R. 220, *Reg. v. MacPherson* [1973] R.T.R. 157, *Reg. v. Cousins* [1982] Q.B. 526. In none of these cases was *Reg. v. Edwards* [1975] Q.B. 27 either cited in argument or referred to in the judgment. In each case the Court of Appeal construed the relevant statutory provision as requiring the burden of proof to be discharged by the prosecution. I do not regard these cases as intending to cast any doubt upon the correctness of the decision in *Reg. v. Edwards*, or as support for the proposition for which they were cited.

Whatever may have been its genesis I am satisfied that the modern rule was encapsulated by Lord Wilberforce in *Nimmo v. Alexander Cowan & Sons Ltd.* [1968] A.C. 107, 130, when speaking of the Scottish section which was then the equivalent of the present section 101 of the Magistrates' Courts Act 1980:

> "I would think, then, that the section merely states the orthodox principle (common to both the criminal and the civil law) that exceptions, etc., are to be set up by those who rely on them."

I would summarise the position thus far by saying that *Woolmington* [1935] A.C. 462 did not lay down a rule that the burden of proving a statutory defence only lay upon the defendant if the statute specifically so provided: that a statute can, on its true construction, place a burden of proof on the defendant although it does not do so expressly: that if a burden of proof is placed on the defendant it is the same burden whether the case be tried summarily or on indictment, namely, a burden that has to be discharged on the balance of probabilities.

The real difficulty in these cases lies in determining upon whom Parliament intended to place the burden of proof when the statute has not expressly so provided. It presents particularly difficult problems of construction when what might be regarded as a matter of defence appears in a clause creating the offence rather than in some subsequent proviso from which it may more readily be inferred that it was intended to provide for a separate defence which a defendant must set up and prove if he wishes to avail himself of it. This difficulty was acutely demonstrated in *Nimmo v. Alexander Cowan & Sons Ltd.* [1968] A.C. 107. Section 29(1) of the Factories Act 1961 provides:

> "There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there."

The question before the House was whether the burden of proving that it was not reasonably practicable to make the working place safe lay upon the defendant or the plaintiff in a civil action. However, as the section also created a summary offence the same question would have arisen in a prosecution. In the event, the House divided three to two on the construction of the section, Lord Reid and Lord Wilberforce holding that the section required the plaintiff or prosecution to prove that it was reasonably practicable to make the working place safe, the majority, Lord Guest, Lord Upjohn and Lord Pearson, holding that if the plaintiff or prosecution proved that the working place was not safe it was for the defendant to excuse himself by proving that it was not reasonably practicable to make it safe. However, their Lordships were in agreement that if the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute.

When all the cases are analysed, those in which the courts have held that the burden lies on the defendant are cases in which the burden can be easily discharged. This point can be demonstrated by what, at first

A blush, appear to be two almost indistinguishable cases that arose under wartime regulations. In *Rex v. Oliver* [1944] K.B. 68 the defendant was prosecuted for selling sugar without a licence. The material part of the Sugar (Control) Order 1940 (S.R. & O. 1940 No. 1068) by article 2 provided:

> "Subject to any directions given or except under and in accordance
B with the terms of a licence permit or other authority granted by or on behalf of the Minister no . . . wholesaler shall by way of trade . . . supply . . . any sugar."

The Court of Criminal Appeal held that this placed the burden upon the defendant to prove that he had the necessary licence to sell sugar. In *Rex v. Putland and Sorrell* [1946] 1 All E.R. 85, the defendant
C was charged with acquiring silk stockings without surrendering clothing coupons. The material part of the Consumer Rationing (Consolidation) Order 1944 (S.R. & O. 1944 No. 800), article 4 provided: "A person shall not acquire rationed goods . . . without surrendering . . . coupons." The Court of Criminal Appeal there held that the burden was upon the prosecution to prove that the clothing had been bought without the surrender of coupons. The real distinction between these two cases lies
D in the comparative difficulty which would face a defendant in discharging the burden of proof.

In *Oliver's* case [1944] K.B. 68 it would have been a simple matter for the defendant to prove that he had a licence if such was the case but in the case of purchase of casual articles of clothing it might, as the court pointed out in *Putland's* case, be a matter of the utmost difficulty
E for a defendant to establish that he had given the appropriate number of coupons for them. It appears to me that it was this consideration that led the court to construe that particular regulation as imposing the burden of proving that coupons had not been surrendered upon the prosecution.

In *Reg. v. Edwards* [1975] Q.B. 27, 39–40 the Court of Appeal expressed their conclusion in the form of an exception to what they said
F was the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. They said that the exception

> "is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence
G or permission of specified authorities."

I have little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare. But I find it difficult to fit *Nimmo v. Alexander Cowan & Sons Ltd.* [1968] A.C. 107 into this formula, and I would prefer to adopt the formula as an
H excellent guide to construction rather than as an exception to a rule. In the final analysis each case must turn upon the construction of the particular legislation to determine whether the defence is an exception within the meaning of section 101 of the Act of 1980 which the Court of

Appeal rightly decided reflects the rule for trials on indictment. With this one qualification I regard *Reg. v. Edwards* as rightly decided.

My Lords, I am, of course, well aware of the body of distinguished academic opinion that urges that wherever a burden of proof is placed upon a defendant by statute the burden should be an evidential burden and not a persuasive burden, and that it has the support of the distinguished signatories to the 11th Report of the Criminal Law Revision Committee, Evidence (General) (1972) (Cmnd. 4991). My Lords, such a fundamental change is, in my view, a matter for Parliament and not a decision of your Lordships' House.

With these considerations in mind I turn now to the question of construction. The essence of the offence is having in one's possession a prohibited substance. In order to establish guilt the prosecution must therefore prove that the prohibited substance is in the possession of the defendant. As it is an offence to have morphine in one form but not an offence to have morphine in another form the prosecution must prove that the morphine is in the prohibited form for otherwise no offence is established. The Court of Appeal recognised the strength of this argument for they said [1986] Q.B. 125, 135:

> "The offence, it will be remembered, is created by section 5(2) of the Act of 1971, under which it is an offence for a person to have a controlled drug in his possession in contravention of section 5(1). Section 5(1) provides that, subject to any regulations under section 7 of the Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession. By virtue of regulation 4(1) of the Regulations of 1973, section 5(1) of the Act shall not have effect in relation to the controlled drugs specified in Schedule 1. If we restrict ourselves to the form and wording of these provisions, a strong argument can be advanced in favour of the proposition that this is simply a case where the possession of certain controlled drugs is prohibited, and the possession of others is not; that it must therefore be for the prosecution to prove that the controlled drug in the possession of the defendant is one the possession of which is prohibited; and that the prosecution must therefore negative the possibility that the drug in question is a controlled drug excluded from the prohibition in section 5(1) because it falls within Schedule 1."

The Court of Appeal rejected this construction primarily because they considered that all the regulations made pursuant to section 7 of the Act should be similarly construed as placing a burden on the defendant. But this approach does not, in my view, give sufficient weight to the difference between the two regulatory powers given to the Secretary of State by section 7(1). Under section 7(1)(*a*), a power is given to provide that it shall not be an offence to possess certain drugs—this is achieved by exempting them in regulation 4. Under section 7(1)(*b*), a power is given to clothe certain persons with immunity for what would otherwise be unlawful acts and this is achieved by the remainder of the regulations in Part II of the Regulations of 1973. These latter regulations provide special defences to what would otherwise be

unlawful acts and would, I accept, place a burden upon defendants to bring themselves within the exceptions if it were necessary to do so. I say "if it were necessary to do so" because of the extreme improbability that an exempted person would be charged with an offence.

However, I regard regulation 4 as in a quite different category from the other regulations in Part II. It deals not with exceptions to what would otherwise be unlawful but with the definition of the essential ingredients of an offence. This can be strikingly demonstrated by reference to regulation 4(2) which provides:

> "Sections 4(1) (which prohibits the production and supply of controlled drugs) and 5(1) of the Act shall not have effect in relation to poppy-straw."

Poppy-straw is shown in Part I of Schedule 2 to the Act as a Class A drug. But Parliament having removed poppy-straw from the Schedule by the regulation where is there room for any burden to lie on a defendant if he is charged with possessing poppy-straw? The defendant's answer is simply that it is not an offence to possess poppy-straw. Clearly, one cannot approach the problem of poppy-straw by saying that the prosecution establishes a prima facie case by proving the possession of poppy-straw because it is a controlled drug within Part I of Schedule 2 to the Act when poppy-straw has been withdrawn from the Schedule for the purposes of an offence under section 5(1). Both parts of regulation 4 must be similarly construed and by a parity of reasoning the prosecution cannot establish a prima facie case of possessing morphine by pointing to morphine in the Schedule when the regulation has provided that it is not an offence to possess morphine in a particular form. The prosecution must prove as an essential element of the offence the possession of a prohibited substance and the burden therefore lies upon the prosecution to prove not only that the powder contained morphine but also that it was not morphine in the form permitted by regulation 4(1) and Schedule 1 thereunder.

I do not share the anxieties of the Court of Appeal that this may place an undue burden on the prosecution. It must be extremely rare for a prosecution to be brought under the Act of 1971 without the substance in question having been analysed. If it has been analysed there will be no difficulty in producing evidence to show that it does not fall within Schedule 1 to the Regulations. I pause here to observe that the analyst was in court during this trial and could, no doubt, have given this evidence if called upon to do so. In future the evidence can, of course, be included in the analyst's report. On the other hand if the burden of proof is placed upon the defendant he may be faced with very real practical difficulties in discharging it. The suspected substance is usually seized by the police for the purposes of analysis and there is no statutory provision entitling the defendant to a proportion of it. Often there is very little of the substance and if it has already been analysed by the prosecution it may have been destroyed in the process. In those cases, which I would surmise are very rare, in which it is intended to prosecute without an analyst's report there will have to be evidence from which the inference can be drawn that the substance was a prohibited drug and

such evidence may well permit of the inference that it was not one of the relatively harmless types of compounds containing little more than traces of the drugs which are contained in Schedule 1 to the Regulations.

Finally, my Lords, as this question of construction is obviously one of real difficulty I have regard to the fact that offences involving the misuse of hard drugs are among the most serious in the criminal calendar and, subject to certain special defences the burden whereof is specifically placed upon the defendant, they are absolute. In these circumstances, it seems to me right to resolve any ambiguity in favour of the defendant and to place the burden of proving the nature of the substance involved in so serious an offence upon the prosecution.

For these reasons, my Lords, I would answer the certified question in the negative. I would allow this appeal and quash the conviction.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Griffiths, and I agree in the proposal he has made for disposal of this appeal and for answering the certified question for the reasons which he has given.

The analyst's certificate, as my noble and learned friend has narrated, stated that the powder analysed "was found to contain morphine mixed with caffeine and atropine." The relevant paragraph (paragraph 3 of Schedule 1 to the Misuse of Drugs Regulations 1973) refers to

> "Any preparation of medicinal opium or of morphine containing (in either case) not more than 0.2 per cent. of morphine calculated as anhydrous morphine base, being a preparation compounded with one or more other active or inert ingredients in such a way that the opium or, as the case may be, the morphine, cannot be recovered by readily applicable means or in a yield which would constitute a risk to health."

I should have thought it quite possible that what is described as "morphine mixed with caffeine and atropine" could not be a preparation of morphine compounded with one or more other active or inert ingredients since I should have thought that in chemical usage a mixture is to be distinguished from a compound since in a mixture there would be no chemical bond between the constituents whereas in a compound there is such bond. However, the case has been argued on behalf of the Crown upon the basis that the appellant could be guilty of an offence under section 5(2) of the Act of 1971 only if the percentage of morphine in the analysed powder was more than 0.2 per cent. The Crown makes no distinction beween the word "mixture" and the word "compound" in this context.

I consider that this case emphasises the need for absolute clarity in the terms of the analyst's certificate founded on by the prosecution in cases of this sort and, in my opinion, it would be wise where there is any possibility of one of the descriptions in the relevant Schedule applying to the substance which is the subject of the certificate that the analyst should state expressly whether or not the substance falls within that description as well as stating whether or not it is a controlled drug within the meaning of the Act of 1971.

A LORD ACKNER. My Lords, I gratefully adopt and therefore do not repeat the statement of the facts and the recital of the relevant legislation so succinctly set out in the speech of my noble and learned friend Lord Griffiths, which I have had the advantage of reading in draft. This appeal raises in essence three relatively short points of law, with which I will seek to deal seriatim.

B 1. *In order to place a burden of proof upon the defendant, does Parliament have expressly so to provide or can it do so by necessary implication*?

It is the appellant's contention that the burden of proof in all cases of trials upon indictment falls upon the prosecution subject only to the defence of insanity and offences where the onus of proof is specially C dealt with by statute. In support of this proposition Mr. Zucker relies principally on *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462. That case was concerned with the constituent elements of the crime of murder. The facts were unusual. The appellant went to his mother-in-law's house where his wife, following a quarrel with him, had gone to stay. He went there to persuade her to return, but he killed her with a shot from a gun which he had fastened with a wire under his D coat. He claimed that he had carried the gun with the view to threatening to commit suicide and that as he tried to use it for this purpose it went off and killed his wife. Swift J. gave the following direction to the jury:

> "Once it is shown . . . that somebody has died through the act of another, that is presumed to be murder, unless the person who has E been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified" (p. 465).

In giving this direction Swift J. relied upon the following passage in F *Foster's Crown Law* (1762), p. 255:

> "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, unless the contrary appeareth."

G The House of Lords quashed the conviction on the ground of misdirection, approving *Rex v. Davies* (1913) 8 Cr. App. R. 211 and *Rex v. Schama and Abramovitch* (1914) 11 Cr.App.R. 45. Viscount Sankey L.C. made the classic statement, at p. 481:

> "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove H the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception."

It is, of course, axiomatic that a statute may impose upon the accused the burden of proof of a particular defence to a statutory

offence and may do so either expressly or by necessary implication. Whichever method Parliament uses it has created a "statutory exception" and there is no difference in the quality or status of such an exception. As at the date of the decision in *Woolmington's* case, there were numerous examples of statutes in which the onus of proof of a particular defence had been placed upon the accused, either expressly or, on a proper construction of the Act, by necessary implication. There is no warrant to be found either in the words used by the Lord Chancellor quoted above or in their context for suggesting that "statutory exception" is limited to *express* statutory exception. In *Mancini v. Director of Public Prosecutions* [1942] A.C. 1, 11 Viscount Simon L.C. referred to Lord Sankey's second exception as covering no more than "offences where onus of proof is specially dealt with by statute." I take the word "specially" to mean no more than that the onus of proof is made the subject of a statutory provision, be this express or implied. Lord Simon was not purporting to narrow the exception identified by Lord Sankey, but merely to repeat it. If he had intended to narrow it to *express* statutory exceptions, this would have been so stated, but the resultant anomaly would then have required justification. Since, ex hypothesi, Parliament had by necessary implication from the words used in the statute made known its intention, by what authority could that intention be ignored? It is a constitutional platitude to state that where Parliament makes its intention known, either expressly or by necessary implication, the courts must give effect to what Parliament has provided. While the very nature of this appeal demonstrates the desirability of Parliamentary draftsmen, whenever it is the intention of Parliament to place a burden of proof upon the accused, so to provide in express terms, the proposition advanced by the appellant cannot be sustained.

2. *Where does the incidence of the burden of proof lie in the offence charged*?

Where Parliament has made no express provision as to the burden of proof, the court must construe the enactment under which the charge is laid. But the court is not confined to the language of the statute. It must look at the substance and the effect of the enactment. The first question which has to be decided is—what is the offence? Here there are the following alternatives: (a) the offence is being in possession of a controlled drug, viz. morphine; or (b) the offence is being in possession of morphine other than a preparation of morphine as specified in paragraph 3 of Schedule 1 to the Regulations of 1973. Robert Goff L.J., giving the judgment of the Court of Appeal (Criminal Division), said [1986] Q.B. 125, 135:

> "If we restrict ourselves to the form and wording of these provisions [sections 5(1) and (2) and section 7 of the Act and regulation 4(1) of and paragraph 3 of Schedule 1 to the Regulations of 1973], a strong argument can be advanced in favour of the proposition that this is simply a case where the possession of certain controlled drugs is prohibited, and the possession of others is not; that it must therefore be for the prosecution to prove that the controlled drug in the possession of the defendant is one, the possession of which

A is prohibited; and that the prosecution must therefore negative the possibility that the drug in question is a controlled drug excluded from the prohibition in section 5(1) because it falls within Schedule 1."

With respect, the Court of Appeal in my judgment would appear to have underestimated the strength of that argument. Mr. Hacking, who B appeared for the Crown, rightly conceded that if Schedule 1 to the Regulations of 1973 had removed morphine entirely from the list of controlled drugs the possession of which was prohibited, the case for the prosecution would have failed in limine once it was apparent, as it would be from the terms of the summons or information, that the controlled drug charged by the prosecution was morphine. Indeed, this C is what the Secretary of State so provided by the Regulations in relation to poppy-straw. This drug appears in Schedule 2 to the Act as a Class A drug. Regulation 4(2) provided in terms:

"Sections 4(1) (which prohibits the production and supply of controlled drugs) and 5(1) of the Act shall not have effect in relation to poppy-straw."

D The Court of Appeal considered that if they restricted themselves to the form and wording of the provisions they would be adopting too narrow an approach. Robert Goff L.J. said, at pp. 135–136:

"In particular, we do not think that we can derive much assistance from the opening words of section 5(1), viz., 'Subject to any regulations under section 7 of this Act for the time being in force.' E We say this because the Regulations of 1973 do not only provide that section 5(1) shall not have effect in relation to the controlled drugs specified in Schedule 1. They also provide, in paragraph 6, for a general authority to possess conferred on certain persons when acting in certain capacities, for example, a constable when acting in the course of his duty as such, or a person engaged in the business of the Post Office when acting in the course of that business. In F paragraph 10, there is provision that certain persons may have in their possession any of the controlled drugs specified in Schedules 2 and 3; these persons are essentially professional persons such as practitioners, pharmacists, matrons, sisters, persons in charge of laboratories, and others. We cannot think that it is incumbent on the prosecution, in a charge brought for an offence under section G 5(2) of the Act of 1971, to negative the possibility that the defendant can take advantage of any of these provisions; . . . Yet all these provisions, like regulation 4(1), form part of 'regulations under section 7 of this Act for the time being in force.' Indeed, Part II of the Regulations is making provision for exceptions from certain provisions of the Act of 1971, and therefore listing those circumstances in which it is, for example, lawful to possess, or H supply, or administer, or produce controlled drugs. Not surprisingly, many of these exceptions relate to the medical profession and other comparable professions; but, even where they do not, as in the case of regulation 4(1) and Schedule 1, they relate to controlled drugs

which anybody may innocently possess, and evidently include controlled drugs with medicinal properties. There is, we think, a strong argument that, in all the exceptions introduced by the Regulations of 1973, the burden of proof should be consistent and for that reason in each case rest on the defendant."

Before us Mr. Zucker, in his able submissions, has emphasised the significant difference between the two classes of regulations which the Secretary of State is empowered to make under section 7 of the Act of 1971, a point which does not appear to have been made before the Court of Appeal. Under powers given to him by virtue of section 7(1)(*a*) the Secretary of State may by regulations "except from section 3(1)(*a*) or (*b*), 4(1)(*a*) or (*b*) or 5(1) of this Act such controlled drugs as may be specified in the regulations." Regulations made under that subsection are clearly directed at reducing the ambit of the offences of importation and exportation of controlled drugs (section 3(1)(*a*) and (*b*)), of using or supplying or offering to supply controlled drugs (section 4(1)(*a*) or (*b*)) and of possession of controlled drugs (section 5(1)) by specifying controlled drugs which otherwise would have been the subject matter of such offences. By contrast, section 7(1)(*b*) empowers the Secretary of State by regulations to make such other provision as he thinks fit for the purpose of making it lawful for persons to do things which under sections 4(1), 5(1) and 6(1) it would otherwise be unlawful for them to do. Regulations made under this power, while leaving the controlled drugs within the ambit of sections 4, 5 and 6, enable the Secretary of State to specify circumstances which will justify what otherwise would be unlawful activity. Thus under regulation 6 a general authority is conferred on certain persons when acting in certain capacities to possess the controlled drug as exemplified by Robert Goff L.J. in the excerpt from the judgment of the Court of Appeal set out above. Mr. Zucker submits that the regulations made under section 7(1)(*a*), where made, affect the definition of the offence, the ingredients of which *all* have to be proved by the prosecution. He concedes, however, that regulations made under section 7(1)(*b*) provide exceptions or excuses, i.e. defences, and in relation to them the incidence of the burden of proof is upon the accused. While accepting these submissions I do not think they conclude the question. The Court of Appeal, in construing the relevant statutory provisions in order to ascertain where the burden of proof lay, rightly concluded, relying on the decision of your Lordships' House in *Nimmo v. Alexander Cowan & Sons Ltd.* [1968] A.C. 107, that they were not restricted to the form or wording of the statutory provisions but were entitled to have regard to matters of policy. *Nimmo's* case concerned a Scottish civil action brought by the pursuer against his employers for damages for breach of their statutory duty under section 29(1) of the Factories Act 1961, which provided:

"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place, shall so far as is reasonably practicable, be made and kept safe for any person working there."

The issue in that case was whether it was necessary for the pursuer to plead and to prove that it was reasonably practicable for the defenders to make the place safe. Your Lordships' House held, by a majority, that as a matter of construction the burden rested on the defenders.

Much was sought to be made by Mr. Zucker of the fact that this was a civil action. This point is disposed of succinctly by Lord Pearson in his speech in these terms, at p. 134:

> "I should point out by way of introduction that the Factories Act 1961 applies both to England and to Scotland (as did the earlier Acts relating to factories) and that for a contravention of the Act the primary remedy—the only remedy expressly provided by the Act—is the prosecution under Part XII. The civil remedy arises only by implication, enabling a workman, for whose protection the provisions were enacted, to recover damages if the contravention of the Act—the breach of statutory duty—has caused him injury. The weight of the burden of proof is different in a civil action (needing, in England at any rate, proof on a balance of probabilities instead of proof beyond reasonable doubt) but I think the incidence of the burden of proof, determining what each party has to prove in order to succeed in the action, must be the same."

Although Lord Reid dissented, his opinion on this point was identical: see p. 115.

Lord Pearson who, together with Lord Guest and Lord Upjohn, constituted the majority did not accept that they were confined, in construing the enactment, to the arrangement of the sections and the forms of expression used in them: see p. 132. There were broader considerations to be taken into account, in particular the practical consequences of holding that the burden of proof rested on one party or the other.

In my judgment, the Court of Appeal were entitled to have regard to the practical consequences in this sense. If the result of holding that the burden of proof rested on the prosecution to establish that the controlled drug had *not* been excepted by the Secretary of State by regulations made under section 7(1)(*a*) of the Act would make the prosecution of offences under the relevant sections particularly difficult or burdensome with the consequence that the purpose of the legislation would be significantly frustrated, then this would be a relevant consideration to weigh against the grammatical form of the legislation.

When dealing with the practical considerations, Robert Goff L.J. stated [1986] Q.B. 125, 136:

> "We are conscious of the fact that, in many cases, a prosecution launched under section 5(2) of the Act of 1971 is not supported by an analyst's report, as for example where it is based on an admission by the defendant (as to which see *Bird v. Adams* [1972] Crim.L.R. 174); another example may arise where there is evidence of the supply to the defendant, or other evidence of his possession, but he has destroyed the drug in question. Yet, if the burden rests on the prosecution to negative the possibility of the drug falling within one of the exceptions in Schedule 1 to the Regulations of 1973, it would

in many cases be necessary for that purpose alone to produce evidence from an analyst. On the other hand, it will only be in rare cases that a defendant will wish to invoke any of the exceptions in the Regulations of 1973. So far as the exceptions in Schedule 1 are concerned, he is only likely to do so in specified circumstances, for example, where he asserts that he has received a drug for medicinal purposes; and we can see no great hardship in saying that, when he wishes to make such an assertion, the burden should rest on the defendant to bring himself within the exception on which he relies. It is not, we think, to be forgotten that we are here concerned with offences relating to the possession of controlled drugs, offences which are regarded with such concern in modern society that Parliament has made them absolute: see *Reg. v. Warner* [1969] 2 A.C. 256."

With respect, I cannot share the concern which the Court of Appeal experienced at the burden resting on the prosecution to negative the possibility of the drug falling within one of the exceptions in Schedule 1 to the Regulations of 1973. If, as in this case, the prosecution obtains possession of the drug, then in order to discover the nature of the drug they would in the ordinary course of events submit it to an analyst. There would have been no difficulty in this case in the analyst's report containing an additional paragraph negativing that it was a preparation within paragraph 3 of Schedule 1. The prosecution must always establish, by admission or otherwise, that the accused had in his possession a controlled drug. I see no practical difficulty in the case postulated by the Court of Appeal of an accused destroying the controlled drug. Such conduct would provide prima facie evidence of the offence. In the instant case the accused, albeit wrongly, admitted that the drug was amphetamine, a Class B drug. Had he destroyed it, and thereby prevented the prosecution from analysing it, there would have been prima facie evidence that he was in possession of a controlled drug which did not fall within one of the exceptions in Schedule 1 to the Regulations of 1973. The Court of Appeal envisaged that an accused was only likely to invoke the Regulations in specified circumstances, providing as an example where he asserts that he has received a drug for medicinal purposes. Such a situation comes under regulation 6 made pursuant to the powers of the Secretary of State under section 7(1)(*b*) and in such a situation it is rightly conceded that the incidence of the burden of proof is upon the accused.

While I accept that the Court of Appeal were entitled to have regard to the practical consequences of holding that the burden of proof rested on one party or the other and were not restricted to the formal wording of the relevant statutory provisions, those practical considerations pointed in my judgment to the burden of negativing the possibility of the drug being within one of the exceptions in Schedule 1 to the Regulations of 1973 resting on the prosecution.

3. *What is the weight of the burden of proof when it rests upon an accused*?

Where the burden of proof rests on the prosecution to negative the possibility of the drug falling within one of the exceptions, it is, of course, common ground that the prosecution must prove its case beyond reasonable doubt. It was, however, strongly urged upon your Lordships that if the burden had been upon the defence, as indeed it is conceded to be if reliance is being placed upon regulation 6, that burden is only an evidential one, that is to say an obligation to establish through evidence from the prosecution and/or evidence from the defence that there is material which raises such a defence, so that it becomes a live issue in the case.

Although, in the light of my decision on the first two points, this question does not arise, I have no hesitation in rejecting Mr. Zucker's submission for the following reasons. (i) It is accepted that when Parliament by express words provides that the proof of the excuse shall lie upon the accused, the legal burden of proof, that is to say the ultimate burden of proof, is placed upon the defendant, and that is discharged "on the balance of probabilities." It cannot logically follow that if, ex hypothesi, Parliament has by necessary implication placed the burden upon the accused, the weight of that burden should be quite different. (ii) The hypothesis is that by necessary implication Parliament has provided in a statute that *proof* of a particular exculpatory matter shall lie on the accused. However, the discharge of an evidential burden *proves* nothing—it merely raises an issue. Accordingly, the mere raising of an issue by the defence would not satisfy the obligation which Parliament has imposed. (iii) Section 101 of the Magistrates' Courts Act 1980 provides:

> "Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification."

It is accepted that the words "the burden of proving the exception . . . shall be on him" imposes the legal burden and that the decision of the Divisional Court in *Gatland v. Metropolitan Police Commissioner* [1968] 2 Q.B. 279 was correct. Mr. Zucker frankly concedes that if his submission is right, the weight of the burden would vary according to whether an accused is tried summarily or on indictment. This anomaly becomes even more remarkable when one bears in mind the extent of hybrid offences, that is offences that can be tried either summarily or on indictment. If Mr. Zucker is correct in his submissions it would follow that a Crown Court judge, sitting with justices and hearing an appeal from conviction in a magistrate's court where an exception etc. was relied upon by the appellant (defendant), would have to advise them that the legal burden of establishing that offence was upon the defendant. In the next case which might be a trial on

indictment for the self-same offence, he would have to give to the jury an entirely different direction with regard to the weight of the burden of proof, it being only the evidential burden. Such a remarkable situation cannot, in my judgment, be attributed to the presumed intention of Parliament.

My Lords, in giving my reasons for allowing this appeal, answering the certified question in the negative and quashing the conviction which are substantially the same as those of my noble and learned friend Lord Griffiths, I have made no mention of *Reg. v. Edwards* [1975] Q.B. 27. I have not done so first because I agree with the Court of Appeal that this case does not fall within the principle stated at p. 40 and secondly because it is clear that the statement of principle is not intended to be exclusive in its effect. Lawton L.J. in giving the judgment of the Court of Appeal stated in terms, at p. 40: "Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid."

Reg. v. Edwards provides, to my mind, a most helpful approach—but it still leaves to be answered in every case where Parliament has made no express provision as to the incidence of the burden of proof the question "what is the proper construction of the enactment?"

Appeal allowed.
Conviction quashed.
Certified question answered in negative.
Costs of appellant to be paid out of central funds.
Costs of Crown incurred before 1 October 1986 to be paid out of central funds.

Solicitors: Sylvester Small & Co., Finsbury Park; Director of Public Prosecutions.

M. G.

[HOUSE OF LORDS]

HOUSE OF FRASER PLC. . . . . RESPONDENTS

AND

A.C.G.E. INVESTMENTS LTD. AND OTHERS . . APPELLANTS

1987 March 9; April 8

Lord Keith of Kinkel, Lord Fraser of Tullybelton, Lord Brandon of Oakbrook, Lord Griffiths and Lord Ackner

Company—Capital—Reduction—Confirmation of—Proposed reduction of capital by cancellation of preferred shares—Reduction proposals passed by special resolution at extraordinary general meeting—No separate meeting of preferred shareholders—Whether abrogation of preferred shareholders' rights

At an extraordinary general meeting of a company registered in Scotland, a special resolution was passed reducing the company's capital by paying off and cancelling the cumulative preference shares. No class meetings of preference shareholders were held to approve or disapprove the reduction. The company presented a petition to the Second Division of the Inner House of the Court of Session under section 136(1) of the Companies Act 1985 praying that the reduction of capital be confirmed. Answers to the petition were lodged by the registered owners of a number of the preference shares, who contended, inter alia, that the failure to hold class meetings of the preference shareholders was in contravention of their rights under the articles of association of the company, article 12 of which provided for such a meeting if the shares were "modified, commuted, affected or dealt with." The Second Division confirmed the reduction of capital.

On the preference shareholders' appeal to the House of Lords:—

Held, dismissing the appeal, that the proposed cancellation of preference shares involved the fulfilment and satisfaction of the contractual rights of the shareholders including the return of capital in priority to other shares; and that, since there had been no variation of those rights, no agreement between the company and the holders in terms of article 12 of the company's articles of association was necessary to effect the reduction of capital sought (post, pp. 393A–G, 394C–F).

In re Saltdean Estate Co. Ltd. [1968] 1 W.L.R. 1844 approved.

Decision of the Second Division of the Inner House of the Court of Session, 1987 S.L.T. 273 affirmed.

The following cases are referred to in the opinion of Lord Keith of Kinkel:

Frazer Brothers Ltd., In re, 1963 S.C. 139

Saltdean Estate Co. Ltd., In re [1968] 1 W.L.R. 1844; [1968] 3 All E.R. 829

White v. Bristol Aeroplane Co. Ltd. [1953] Ch. 65; [1953] 2 W.L.R. 144; [1953] 1 All E.R. 40, C.A.

No additional cases were cited in argument.

APPEAL from the Court of Session.

This was an appeal by the appellants, A.C.G.E. Investments Ltd. and Lonrho Plc., from an interlocutor of the Second Division of the Inner House of the Court of Session (Lord Ross, Lord Justice-Clerk, Lord Kincraig and Lord Wylie) of 28 October 1986 by which in a petition by the respondents, House of Fraser Plc., the court confirmed, under section 137 of the Companies Act 1985, a reduction of that company's capital resolved by special resolution of the company on 11 June 1986.

The facts are set out in the opinion of Lord Keith of Kinkel.

John Beveridge Q.C. and *Patrick Hodge* (of the Scottish Bar) for the appellants. The respondents were not empowered to cancel the preference shares in the proposed reduction of capital without obtaining the consent of the holders of the preference shares in terms of article 12 of the respondents' articles of association. On its natural and proper construction that article gives holders of issued shares in a class a right to vote in a class meeting not only on proposals which alter or abrogate the literal terms of the special rights of their class of shares but also, by use of the words "commuted, affected or dealt with," on proposals which by cancelling such shares bring to an end the shareholders' right to receive an annual cumulative preference dividend. The words of article 12 should be given their natural meaning. "Commuted," "affected" and "dealt with" all apply to a situation in which the rights of preference shareholders go from rights of income to a right of repayment of capital. To interpret those three words merely as particular forms of variation of class rights is to render them superfluous beside the word "modified." In *White v. Bristol Aeroplane Co. Ltd.* [1953] Ch. 65 the rights of the aggrieved preference shareholders were neither varied nor cancelled and the case is therefore distinguishable from the present case. The distinction in the *White* case between the affecting of the enjoyment of the rights and the affecting of the rights themselves is legalistic and gives insufficient weight to the importance of the practical business consequences of a measure which affected the enjoyment of the rights of preference shareholders by diluting them: see *Palmer's Company Law*, 23rd ed. (1982), pp. 405–406; *Gower, Modern Company Law,* 4th ed. (1979), p. 567; and *Gore-Browne on Companies*, 44th ed. (1986), p. 14.012, para. 14–7.2. It is accepted that if the textbooks are right, that nevertheless Parliament has not acted to remedy the situation, but it is open to the House to clarify the law. In the present appeal there is insufficient reason to do violence to the language of the article. "Affected" and "dealt with" should be given their commercial meaning.

J. A. D. Hope Q.C., Dean of Faculty, and *P. H. Brodie* (both of the Scottish Bar) for the respondents, were not called upon.

Their Lordships took time for consideration.

8 April. LORD KEITH OF KINKEL. My Lords, this appeal from an interlocutor of the Second Division of the Inner House of the Court of

Session is concerned with the proper interpretation of certain provisions of the articles of association of the respondent company ("House of Fraser"), in which the appellants are holders of a particular class of preference shares.

The matter arises in connection with a petition for confirmation of reduction of capital presented by House of Fraser. The reduction, which involves the paying off of the whole preference share capital of the company as being in excess of the wants of the company, was accomplished by special resolution passed at an extraordinary general meeting attended by ordinary shareholders only. No class meetings of preference shareholders were held to approve or disapprove the reduction. The appellants maintain that this failure was in contravention of their rights under the articles of association of the company, and that confirmation of the reduction of capital should therefore be refused. Before the Inner House it was also contended by them that the reduction of capital constituted a variation of their class rights within the meaning of section 125 of the Companies Act 1985, which had not been consented to by the requisite majorities at separate class meetings of preference shareholders, and that it was therefore ineffective. The Second Division (Lord Ross, Lord Justice-Clerk, Lord Kincraig and Lord Wylie) 1987 S.L.T. 273 by the interlocutor appealed from rejected both contentions for the appellants and confirmed the reduction of capital. Before your Lordships' House counsel for the appellants abandoned the second contention and submitted argument in support only of the first.

At the material time the share capital of House of Fraser was £50m. divided into (i) 350,000 3.15 per cent. cumulative preference shares of £1 each, (ii) 42,639 3.85 per cent. cumulative preference shares of £1 each, (iii) 365,328 5.25 per cent. cumulative preference shares of £1 each, (iv) 985,752,975 ordinary shares of 1p each, (v) 153,679,045 deferred shares of 25p each, and (vi) 964,742 unclassified shares of £1 each. All the preference shares were issued and fully paid. 153,679,045 of each of the ordinary shares and the deferred shares were issued and fully paid. The remaining shares were unissued.

The appellants are holders of 97,953 of the 5.25 per cent. cumulative preference shares. All the issued ordinary and deferred shares are held by House of Fraser Holdings Plc. It is to be observed that in the articles of association of House of Fraser the 3.15 per cent., 3.85 per cent. and 5.25 per cent. cumulative preference shares are referred to respectively as 4½ per cent., 5½ per cent. and 7½ per cent. cumulative preference shares, and that the two latter classes are there referred to collectively as "the second preference shares." The reason for the difference in the stated rates of interest is to be found in paragraph 18 of Schedule 23 to the Finance Act 1972.

Article 4 of the company's articles of association provides that the 4½ per cent. preference shares and the second preference shares shall respectively carry certain rights and privileges, and be subject to certain restrictions and limitations. Those relating to the second preference shares are set out as follows:

> "(B)(*a*) The second preference shares shall, except as regards rate of dividend, rank pari passu in all respects as if they were a single

class. (*b*) The second preference shares shall entitle the holders to receive out of the profits of the company available for distribution and resolved to be distributed (after payment of the 4½ per cent. cumulative preferential dividend on the 4½ per cent. preference shares but in priority to the payment of dividend on any other class of shares or stock of the company) a fixed cumulative preferential dividend on the capital for the time being paid up thereon (i) at the rate of 7½ per cent. per annum in the case of the 7½ per cent. cumulative preference shares and (ii) at the rate of 5½ per cent. per annum in the case of the 5½ per cent. cumulative preference shares. (*c*) On a return of capital on a winding up or otherwise, the assets of the company available for distribution amongst the members (after satisfaction of the relevant rights of the holders of the 4½ per cent. preference shares) shall be applied in priority to any payment in respect of any other class of shares or stock of the company in paying to the holders of the second preference shares the appropriate sum per share mentioned in sub-paragraph (*d*) below, together with a sum equal to any arrears or accruals of the fixed dividend to which such shares are entitled under the provisions of sub-paragraph (*b*) above (less an amount equal to income tax thereon at the standard rate in force on the date of payment) to be calculated down to the date of the return of capital and to be payable irrespective of whether or not such dividend has been declared or earned. (*d*) The said sum per share payable in respect of the second preference shares on a return of capital on a winding up or otherwise shall be the greater of (i) a sum per share as certified by the company's auditors equal to the average of the means of the daily quotations at which the 7½ per cent. cumulative preference shares or as the case may be the 5½ per cent. cumulative preference shares shall have been quoted on the Stock Exchange, London, during the six months immediately preceding the relevant date (as hereinafter defined) after first deducting from the mean on each day an amount equal to all arrears and accruals of the fixed dividend (whether or not declared or earned) on such share up to that day less an amount equal to income tax on such arrears and accruals at the standard rate in force on that day, and (ii) a sum per share equal to the nominal amount for the time being paid up thereon. Provided that, if on a return of capital a part only of the amount for the time being paid up on the second preference shares is to be repaid, then a proportionate part of the said sum per share shall be payable. The relevant date for the foregoing purposes shall be thirty days before the date of the notice convening the meeting to pass the resolution for the winding-up of the company or the return of capital or in the case of a compulsory winding-up thirty days before its commencement. (*e*) The second preference shares shall not confer the right to any further or other participation in the profits or assets of the company. (*f*) The holders of the second preference shares shall be entitled to receive notice of any general meeting of the Company but shall not by virtue of or in respect of their holdings of such preference shares be entitled to attend or vote

thereat unless (i) their fixed preferential dividend or any part thereof shall at the date when the notice convening the meeting is sent out be six months in arrear, for which purpose such dividend shall be deemed to be payable half-yearly on the thirty-first day of January and the thirty-first day of July in each year, or (ii) the business of the meeting includes the consideration of a resolution (a) pursuant to article 105 hereof [relating to borrowing powers] or for the amendment of that article, in which event the holders of the second preference shares shall have the right to vote only on such resolution, or (b) varying the rights or privileges of the holders of either class of such preference shares, in which event the holders of such class of such preference shares shall have the right to vote only on such resolution. (*g*) Save with the prior consent or sanction of the holders of each class of the second preference shares given in accordance with these presents, no shares shall be created or issued to rank as regards participation in the profits or assets of the company in priority to or pari passu with the second preference shares . . ."

There follows a proviso not relevant for present purposes.

It is to be observed that paragraph (A)(*e*) of the article, which is one of the provisions dealing with the rights of 4½ per cent. preference shareholders, and which corresponds roughly to paragraph (B)(*f*), provides that any resolution for the winding up of the company shall be deemed to be a resolution affecting the rights and privileges of the 4½ per cent. preference shareholders. There is no similar provision in relation to the second preference shareholders.

Article 12, headed "Variation of Rights" provides:

"If at any time the capital of the company is divided into different classes of shares, the special rights attached to any class may, subject to the provisions of the statutes, be modified, commuted, affected or dealt with by agreement between the company and any person purporting to contract on behalf of that class provided such agreement is ratified in writing by the holders of at least three-fourths in nominal value of the issued shares of the class or is confirmed by an extraordinary resolution passed at a separate general meeting of the holders of shares of that class and all provisions herein contained as to general meetings shall, mutatis mutandis, apply to every such meeting but so that the quorum thereof shall be members or corporation representatives holding or representing by proxy one-third of the nominal amount of the issued shares of that class, and that at any such meeting, immediately upon a declaration of the result of the show of hands, a poll may be demanded by the chairman or by at least three members or corporation representatives present in person or by proxy entitled to vote at the meeting and holding together not less than one-twentieth of the nominal amount of the issued shares of the class. Without prejudice to the rights of the holders of the 4½ per cent. preference shares and the second preference shares, the special rights conferred upon the holders of any shares or class of shares shall not,

unless otherwise expressly provided in the rights attaching to or the terms of issue of such shares, be deemed to be altered by the creation or issue of further shares ranking 'pari passu' therewith."

Article 14(D) provides that the company may by special resolution reduce its share capital in any manner authorised by the Companies Acts for the time being in force.

For the purposes of the proposed reduction of capital the company's auditors certified in terms of article 4(B)(*d*) that the average of the mean prices over the relevant period was 45p per share in the case of the 3.85 per cent. preference shares and 65p in the case of the 5.25 per cent. preference shares. The reduction of capital accordingly provided for the second preference shareholders to be repaid at par.

The argument for the appellants picked upon the words "commuted" and "affected" in article 12, it being maintained that these words were apt to describe the situation where the rights of the second preference shareholders under article 4(B) were converted into a right to receive payment of a capital sum. Reference was made to *White v. Bristol Aeroplane Co. Ltd.* [1953] Ch. 65. In that case the articles of association of the company provided that the rights of any class of shareholders might be "affected, modified, varied, dealt with, or abrogated" with the consent of a special resolution passed at a meeting of members of the class. The company proposed to increase its capital by the issue of further preference shares ranking pari passu with existing preference shares. The existing preference shareholders challenged the carrying out of the proposal without their consent signified at a separate class meeting. The Court of Appeal held that the proposed increase of capital did not "affect" the rights of the existing preference shareholders within the meaning of the relevant article. Lord Evershed M.R., at p. 74, expressed the opinion that the enjoyment of the rights of the preference shareholders would be affected by the increase of capital but drew a distinction between the affecting of the enjoyment of the rights and the affecting of the rights themselves. Counsel for the appellants criticised this distinction on the ground that it was excessively legalistic and gave insufficient weight to the importance from the business point of view of the practical consequences of a measure which affected the enjoyment of the rights of preference shareholders by diluting them. Attention was drawn to passages in a number of textbooks where similar criticism was made.

My Lords, in my opinion the only question at issue in this appeal is whether or not the proposed reduction of capital accords with the rights conferred upon the second preference shareholders by the articles of association, in particular article 4(B). In *In re Saltdean Estate Co. Ltd.* [1968] 1 W.L.R. 1844 the articles of association of the company required the consent of a class meeting to any proposal which was such as to "affect, modify, deal with or abrogate in any manner" the rights and privileges of that class of shareholders. The company proposed to reduce its share capital by paying off its preference shareholders, who opposed the reduction on the ground that no separate class meeting had been

held. Buckley J., a judge of unrivalled experience in company law, granted confirmation of the reduction. He said, at pp. 1849-1850:

> "It has long been recognised that, at least in normal circumstances, where a company's capital is to be reduced by repaying paid up share capital, in the absence of agreement or the sanction of a class meeting to the contrary, that class of capital should first be repaid which would be returned first in a winding up of a company (see *In re Chatterley-Whitfield Collieries Ltd.* [1948] 2 All E.R. 593, 596 *per* Lord Greene M.R.). In the present case the preferred shareholders are entitled to prior repayment of capital in a winding up and, consequently, if the company has more paid-up capital than it needs and wishes to repay some part of it, the first class of capital to be repaid should prima facie be the preferred shares. . . .
>
> ". . . it is said that the proposed cancellation of the preferred shares will constitute an abrogation of all the rights attached to those shares which cannot validly be effected without an extraordinary resolution of a class meeting of preferred shareholders under article 8 of the company's articles. In my judgment, that article has no application to a cancellation of shares on a reduction of capital which is in accord with the rights attached to the shares of the company. Unless this reduction can be shown to be unfair to the preferred shareholders on other grounds, it is in accordance with the right and liability to prior repayment of capital attached to their shares. The liability to prior repayment on a reduction of capital, corresponding to their right to prior return of capital in a winding up, is a liability of a kind of which Lord Greene M.R., in the passage I have referred to, said that anyone has only himself to blame if he does not know it. It is part of the bargain between the shareholders and forms an integral part of the definition or delimitation of the bundle of rights which make up a preferred share. Giving effect to it does not involve the variation or abrogation of any right attached to such a share."

I consider this to be an entirely correct statement of the law. Buckley J. does not address his mind to any special meaning which might fall to be attributed to the words "affect, modify, deal with" in juxtaposition with the word "abrogate." There was no need for him to do so. The proposed reduction of capital involved an extinction of the preferred shares in strict accordance with the contract embodied in the articles of association, to which the holders of the preferred shares were party. One of the rights attached to these shares was the right to a return of capital in priority to other shareholders where any capital was appropriately to be returned as being in excess of the company's needs. That right was not being affected, modified, dealt with or abrogated, but was being given effect to.

In the present case article 4(B)(*c*) refers specifically to a return of capital on a winding up or otherwise. The words "or otherwise" are plainly apt to apply to repayment of capital which is in excess of the needs of the company, which may be brought about by a reduction of capital such as is authorised by article 14(D). In such a reduction of

capital the second preference shareholders are entitled to priority of repayment after the 3.15 per cent. preference shares and before any other shareholders. The reduction of capital now proposed to be made gives effect to that right. This necessarily involves, of course, that all other rights attached to the shares will come to an end, but that is something to which the holders of the shares must be taken to have agreed as a necessary consequence of their right to prior repayment receiving effect. Upon no view of the matter can it be said that as a result any of the special rights attached to the shares has been "modified, commuted, affected or dealt with" within the meaning of article 12. These words all contemplate that after the relevant transaction the shareholders in question will continue to possess some rights, albeit of a different nature from those which they possessed before the transaction. The proposal for reduction of capital involves the complete cancellation of the shares. I respectfully agree with the passage in the opinion of the court below delivered by the Lord Justice-Clerk, 1987 S.L.T. 273, 278:

> "In our opinion the proposed cancellation of the preference shares would involve fulfilment or satisfaction of the contractual rights of the shareholders, and would not involve any variation of their rights. Variation of a right presupposes the existence of the right, the variation of the right, and the subsequent continued existence of the right as varied. A different situation obtains where a right is fulfilled and satisfied and thereafter ceases to exist."

In *In re Frazer Brothers Ltd.*, 1963 S.C. 139 a reduction of capital involving repayment of preference shares and their cancellation was proposed by a company whose articles of association included regulation 4 of Table A to the Companies (Consolidation) Act 1908, which provided inter alia for the holding of separate class meetings where the rights of any class of shareholder were to be varied. A separate class meeting of preference shareholders had in fact been held, and had approved the reduction of capital, but the reporter to whom the petition for confirmation had been remitted queried the necessity of such a meeting. Lord President Clyde, delivering the opinion of the First Division, expressed the view that the holding of the meeting had been necessary to the validity of the reduction of capital, in respect that it involved the abolition of the rights of the preference shareholders. The report does not set out the terms of all the relevant articles of association of the petitioning company, and thus does not disclose what these provided as regards priorities on a winding up or other return of capital. There was no argument before the court, and it does not appear that the Lord President had in mind any reported authority on the topic. In the result the decision, whether right or wrong on a proper construction of the articles of association of the petitioning company, cannot be regarded as having any authoritative force.

My Lords, for these reasons I would dismiss the appeal, with costs.

Lord Fraser of Tullybelton. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord

Keith of Kinkel and I agree with it. For the reasons which he gives I would dismiss the appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would dismiss the appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Stephenson Harwood for Dickson Minto, W.S., Edinburgh and Brodies, W.S., Edinburgh; Herbert Smith for McGrigor Donald, Edinburgh.

C. T. B.

A

[HOUSE OF LORDS]

DEBENHAMS PLC. . . . . RESPONDENTS

AND

WESTMINSTER CITY COUNCIL . . . APPELLANTS

B

1986 Oct. 27, 29, 30; Dec. 4

Lord Keith of Kinkel, Lord Templeman, Lord Griffiths, Lord Mackay of Clashfern and Lord Ackner

Rating—Unoccupied hereditament—Exemption from rates—Hereditament comprising two buildings joined by bridge and subway—One building listed as of special architectural or historic interest—Whether listing extending to both buildings—Whether exemption applying to hereditament only part of which listed—General Rate Act 1967 (c. 9), Sch. 1, para. 2(c) (as amended by Town and Country Planning Act 1971 (c. 78), s. 291, Sch. 23)—Town and Country Planning Act 1971 (c. 78), s. 54(9)

C

Schedule 1, paragraph 2(*c*), to the General Rate Act 1967 (as amended) provided that no rates should be payable in respect of an unoccupied hereditament for any period during which "(*c*) the hereditament is . . . included in a list compiled or approved under section 54 of [the Town and Country Planning Act 1971] . . ." Section 54(9) of the Act of 1971 provides:

D

"for the purposes of the provisions of this Act relating to listed buildings and building preservation notices, any object or structure fixed to a building, or forming part of the land and comprised within the curtilage of a building, shall be treated as part of the building."

E

Two buildings comprised a single hereditament for rating purposes. The first building fronted on to a main thoroughfare and its rear faced on to a minor road. The second building was on the opposite side of the minor road but was joined to the first building by a bridge over the road and a subway under it. Both buildings had been used together as shop premises, but in the rating year February 1982 to March 1983 both were unoccupied and during January to March 1985 the subway was filled in and the bridge removed, to enable the second building to be sold separately. The owners of the hereditament contended that they were under no liability to pay unoccupied rates pursuant to section 17 of and Schedule 1 to the Act of 1967 on the ground that the inclusion of a description of the first building in a list of buildings of special architectural or historic interest compiled by the Secretary of State under section 54 of the Act of 1971 was apt to include the whole of the rateable hereditament. On the hearing of the rating authority's summons for non-payment of rates, the stipendiary magistrate held that the first building was included in the listing, but not the second, and that as only part of the hereditament was listed there was no exemption from liability to rates when unoccupied. On the owners' appeal by way of case stated, Hodgson J. held that the entire hereditament was included in the listing and was therefore exempt from rates. The Court of Appeal upheld that decision.

F

G

H

On appeal by the rating authority:—

Held, (1) that notwithstanding the extended definition of "listed building" in section 54(9) of the Act of 1971 being prefaced by the words "for the purposes of this Act", the definition applied equally for the purposes of Schedule 1, paragraph 2(*c*), to the Act of 1967 (post, pp. 404D–E, 406D–F, 412D–F).

(2) (Lord Ackner dissenting), that on its true construction, section 54(9) in including "a structure fixed to a building" in the definition of a listed building referred only to structures ancillary to the listed building itself and not to structures constituting some other complete building; accordingly, only the first building was listed under section 54 of the Act of 1971 (post, pp. 403F—404D, 406D–E, 408H—409B, 410D–E).

Attorney-General ex rel. Sutcliffe v. Calderdale Borough Council (1982) 46 P. & C.R. 399, C.A. distinguished.

(3) Allowing the appeal, (*per* Lord Keith of Kinkel, Lord Templeman, Lord Griffiths and Lord Mackay of Clashfern) that the exemption from rates afforded to buildings listed as being of special architectural or historic interest by Schedule 1, paragraph 2(*c*), to the Act of 1967 did not apply to hereditaments only part of which were listed under section 54 of the Act of 1971 and, accordingly, exemption from rates was not available to the owners' hereditament for the rating year 1982–83 (post, p. 406A–G).

Providence Properties Ltd. v. Liverpool City Council [1980] R.A. 189, D.C. applied.

Decision of the Court of Appeal [1986] R.A. 114 reversed.

The following cases are referred to in their Lordships' opinions:

Attorney-General ex rel. Sutcliffe v. Calderdale Borough Council (1982) 46 P. & C.R. 399, C.A.

Corthorn Land and Timber Co. Ltd. v. Minister of Housing and Local Government (1965) 17 P. & C.R. 210

Providence Properties Ltd. v. Liverpool City Council [1980] R.A. 189, D.C.

The following additional cases were cited in argument:

Camden London Borough Council v. Post Office [1977] 1 W.L.R. 892; [1977] 2 All E.R. 795, C.A.

Methuen-Campbell v. Walters [1979] Q.B. 525; [1979] 2 W.L.R. 113; [1979] 1 All E.R. 606, C.A.

Vandyk v. Oliver [1976] A.C. 659; [1976] 2 W.L.R. 235; [1976] 1 All E.R. 466, H.L.(E.)

Appeal from the Court of Appeal.

This was an appeal by leave of the House of Lords by the appellants, the City of Westminster, against the order of the Court of Appeal (Fox, Neill and Ralph Gibson L.JJ.) [1986] R.A. 114 on 25 March 1986 dismissing their appeal from the judgment of Hodgson J. [1985] R.A. 265 on 7 February 1985 allowing an appeal by way of case stated from the direction of the stipendiary magistrate (John Quentin Campbell) on 29 March 1983 that a distress warrant be issued against the respondents, Debenhams Plc., for non-payment of rates in respect of their premises at 200-202 Regent Street, 50-52 and 27-28 Kingly Street, London, W.1.

The facts are set out in the opinions of their Lordships. A

Graham Eyre Q.C. and *Richard Hone* for the appellants. The question in the appeal is whether, on a true construction of the statutory provisions, the hereditaments comprising numbers 200/202 Regent St., 50/52 and 27/28 Kingley St was included in a list compiled under section 54 of the Town and Country Planning Act 1971 and was thereby exempt B from the payment of empty rates by virtue of the provisions of paragraph 2(*c*) of Schedule 1 to the General Rate Act 1967, as amended. There are two distinct strands of legislation—the control of buildings of special architectural or historic interest under the Town and Country Planning legislation; and rating legislation—with entirely different policy considerations. The policy justification for section 54(9) of the Town and Country Planning Act 1971 is that works of demolition, alteration or C extension undertaken to objects or structures either fixed to a listed building or forming part of the land and comprised within the curtilage of a listed building, may have such serious implications for the listed part of the building that they should be brought under the control of the planning authority or the Secretary of State so that the implications for the listed building itself can be considered. On the other hand, in the D context of the General Rate Act 1967, the decision of the Court of Appeal below means that, by way of example, the whole of a large department store in a prime shopping location would be exempt from the payment of unoccupied rates for as long as its owners chose to keep it empty if a small part was included in the relevant list; for example, the facade. The provisions of the Act of 1971 do not seriously affect the power of the owner to make full economic use of the hereditament E because the hereditament can always be used for its intended commercial or other economic purpose. Demolition, alteration or extension are controlled, but only so far as such works would affect its character as a building of special architectural or historic interest: see section 55(1) of the Act of 1971. The provisions of section 54(9) of that Act do not otherwise interfere with the owners' or occupiers' use and occupation of the hereditament. Full economic use, therefore, is an irrelevant test for F what is plain statutory language, and insofar as the Court of Appeal relied on that concept, it was an ill-founded approach. Although it is logical that such buildings should be subject to control, it is wholly irrelevant whether or not other legislation treats them differently for other purposes. *Providence Properties Ltd. v. Liverpool City Council* [1980] R.A. 189 decided that the paragraph 2(*c*) exemption was not G available to a hereditament only part of which was listed. We rely on that decision. Any anomalies that arise can be cured by administrative procedures by virtue of paragraph 3 of Schedule 1 to the Act of 1967. Exemption from rates afforded to buildings listed by virtue of paragraph 2(*c*) did not apply to hereditaments only part of which were listed under section 54.

Matthew Horton and *Michael Humphries* for the respondents. H *Providence Properties* was wrongly decided. If part of a hereditament, however small, is included in a list of buildings of special architectural or historic interest, the paragraph 2(*c*) exemption is available. The correct

starting point is an examination of the words of paragraph 2(*c*) and their context, the remainder of Schedule 1. The hereditament referred to has to be a relevant hereditament. It will frequently be the case that such a hereditament comprises land as well as buildings, e.g. house and garden. Since only buildings can be listed, for the exemption to apply in such a case, the paragraph 2(*c*) exemption must apply to partly listed hereditaments. Alternatively, the reference in paragraph 2(*c*) to hereditament is a reference to buildings, in which case one can go straight to the definition of building in paragraph 15 of the Schedule, which includes part. Without doing any violence to the language paragraph 2(*c*) refers to buildings and parts thereof. If necessary one should read "hereditament" in paragraph 2(*c*) as referring to the hereditament or part thereof in order to achieve what Parliament clearly intended: *Camden London Borough Council v. Post Office* [1977] 1 W.L.R. 892 [Reference was also made to *Vandyk v. Oliver* [1976] A.C. 659.]

Even if paragraph 2(*c*) does not apply to a partly listed hereditament, in the present case the exemption applies because the whole hereditament was a listed building by virtue of section 54(9) of the Act of 1971. Reliance is placed on *Attorney-General ex rel. Sutcliffe v. Calderdale Borough Council* (1982) 46 P. & C.R. 399 [Reference was also made to *Methuen-Campbell v. Walters* [1979] Q.B. 525 as to the definition of curtilage.] The use of that definition should not be confined to planning legislation.

The purposes of listing buildings and the purposes of granting rating exemption for listed buildings must be the same namely to ensure the preservation of the buildings. Clearly, where an occupier has even a partly listed building he is not as free to make an empty property more marketable by, for example, modernising it. Exemption from rates compensates him for that.

Eyre Q.C. in reply. *Calderdale* is not relevant to the present appeal, having nothing to do with the construction of the Act of 1967, and, in any event, was a case on its special facts and should be distinguished. We are dealing with clear statutory language and there is no room for a purposive construction.

Their Lordships took time for consideration.

4 December. Lord Keith of Kinkel. My Lords, this appeal raises difficult questions as to the proper construction of certain of the unoccupied rates provisions of the General Rate Act 1967 (as amended) in their application to buildings listed by the Secretary of State, under section 54 of the Town and Country Planning Act 1971, as being of special architectural or historic interest. The proper construction of certain provisions of section 54 is also in issue.

The appellants are the rating authority for the City of Westminster, and the respondents were at the material time owners of a hereditament described in the valuation list which came into force on 1 April 1973 as "200/202 Regent Street (and 50/52 Kingly Street)." This hereditament was formerly Hamley's toy shop. It comprised premises fronting onto

Regent Street and running back to the west side of Kingly Street at the rear, and also (notwithstanding the description in the list) further premises on the east side of Kingly Street and known as 27/28 Kingly Street. The back part of the former premises (50/52 Kingly Street) was formerly connected to the latter premises by a footbridge passing over Kingly Street at second floor level and by a tunnel passing underneath it. The tunnel was filled in by operations which concluded in January 1983 and the footbridge was removed in March 1983. These works were done to enable 27/28 Kingly Street to be sold separately. No physical demarcation existed between 200/202 Regent Street and 50/52 Kingly Street.

In 1973 the Secretary of State for the Environment compiled, under section 54 of the Act of 1971, a list of buildings of special architectural or historic interest which included a number of properties in Regent Street. Under the heading "Regent Street, W1 (East Side)" there appeared, inter alia, "Nos 172 to 206 (even)."

The respondents occupied the hereditament and carried on Hamley's toy shop there until 31 October 1981, when they vacated it, and it remained unoccupied when, on 22 July 1982, the appellants made a complaint against the respondents for non-payment of rates amounting to £68,696.91 upon the hereditament in respect of the period from 1 February 1982 to 31 March 1983. At the same time they issued a summons applying for a distress warrant, which was heard by Mr. Campbell, a metropolitan stipendiary magistrate, on 29 March 1983. The respondents claimed exemption from unoccupied rates under Schedule 1, paragraph 2(*c*) to the Act of 1967 as amended, but the magistrate rejected the claim and issued a distress warrant, holding that the exemption for listed buildings there provided for was not available when, as he found to be the case, part only of the hereditament was listed. He found that 200/202 Regent Street and 50/52 Kingly Street were listed but that 27/28 Kingly Street was not. At the request of the respondents the magistrate stated a case for the opinion of the High Court, in which he made findings of fact upon which the foregoing account is based and posed the following questions of law:

> "(i) Did I err in law in holding that only part of the hereditament was listed? (ii) Did I err in law in holding that the listed part was 200/202 Regent Street and 50/52 Kingly Street?"

The respondents' appeal by stated case was heard by Hodgson J. [1985] R.A. 265, who allowed it and answered the questions of law in the affirmative. On appeal by the rating authority the Court of Appeal (Fox, Neill and Ralph Gibson L.JJ.) [1986] R.A. 114 affirmed that decision. The authority now appeals to your Lordships' House.

Section 17 of the Act of 1967 provides that a rating authority may resolve that the provisions of Schedule 1 to the Act shall apply to their area, and the appellants have done so. Paragraph 1(1) of Schedule 1 provides that in these circumstances where any relevant hereditament in the area is unoccupied for a continuous period exceeding three months

> "the owner shall, subject to the provisions of this Schedule, be rated in respect of that hereditament for any relevant period of

vacancy; and the provisions of this Act shall apply accordingly as if the hereditament were occupied during that relevant period of vacancy by the owner."

By paragraph 15:

"'relevant hereditament' means any hereditament consisting of, or of part of, a house, shop, office, factory, mill or other building whatsoever, together with any garden, yard, court or other land ordinarily used or intended for use for the purposes of the building or part; . . ."

Paragraph 2, as amended by section 291 of, and Schedule 23 to the Town and Country Planning Act 1971, provides:

"No rates shall be payable under paragraph 1 of this Schedule in respect of a hereditament for, or for any part of the three months beginning with the day following the end of, any period during which—(*a*) the owner is prohibited by law from occupying the hereditament or allowing it to be occupied; (*b*) the hereditament is kept vacant by reason of action taken by or on behalf of the Crown or any local or public authority with a view to prohibiting the occupation of the hereditament or to acquiring it; (*c*) the hereditament is the subject of a building preservation notice as defined by section 58 of the Town and Country Planning Act 1971 or is included in a list compiled or approved under section 54 of that Act, or is notified to the rating authority by the Minister as a building of architectural or historic interest; (*d*) the hereditament is the subject of a preservation order or an interim preservation notice under the Ancient Monuments Acts 1913 to 1953, or is included in a list published by the Minister of Public Building and Works under those Acts; (*e*) an agreement is in force with respect to the hereditament under section 56(1)(*a*) of this Act; or (*f*) the hereditament is held for the purpose of being available for occupation by a minister of religion as a residence from which to perform the duties of his office."

It is in sub-paragraph (*c*) of that paragraph which is directly in point here. If it be a correct conclusion that the whole of the hereditament is to be regarded as included in the list compiled by the Secretary of State in 1973, notwithstanding that only part of it is specifically mentioned in that list, then exemption from unoccupied rates will be available. Counsel for the respondents argued that, on a proper construction and application of the relevant provisions of the Act of 1971 as regards listing, this was indeed the position.

Section 54(1) (2) and (9) of that Act is in these terms:

"(1) For the purposes of this Act and with a view to the guidance of local planning authorities in the performance of their functions under this Act in relation to buildings of special architectural or historic interest, the Secretary of State shall compile lists of such buildings, or approve, with or without modifications, such lists compiled by other persons or bodies of persons, and may amend

any list so compiled or approved. (2) In considering whether to include a building in a list compiled or approved under this section, the Secretary of State may take into account not only the building itself but also—(*a*) any respect in which its exterior contributes to the architectural or historic interest of any group of buildings of which it forms part; and (*b*) the desirability of preserving, on the ground of its architectural or historic interest, any feature of the building consisting of a man-made object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building. . . . (9) In this Act 'listed building' means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and, for the purposes of the provisions of this Act relating to listed buildings and building preservation notices, any object or structure fixed to a building, or forming part of the land and comprised within the curtilage of a building, shall be treated as part of the building."

The argument for the respondents, which was accepted by Hodgson J. and the Court of Appeal, was that the building 27/28 Kingly Street, not mentioned in the list compiled by the Secretary of State, was, within the meaning of section 54(9) a "structure" which by the footbridge and the tunnel was fixed to the building 200/202 Regent Street and 50/52 Kingly Street, which was mentioned in that list, or alternatively formed part of the land and was within the curtilage of the latter building. Accordingly it fell to be treated as part of that listed building. The argument was supported by reliance on *Attorney-General ex rel. Sutcliffe v. Calderdale Borough Council* (1982) 46 P. & C.R. 399. That case concerned a disused mill and a terrace of cottages with a bridge linking the two, the cottages having been formerly owned by the millowners and occupied by their workers, though they had later come to be in separate ownership. The mill was listed but the cottages were not. The Court of Appeal held that, within the meaning of section 54(9), the terrace of cottages was a structure fixed to the mill, and further was one which formed part of the land and was comprised within the curtilage of the mill. The cottages could not, therefore, be demolished without the consent of the Secretary of State.

In my opinion, the success or failure of the argument must turn on the meaning to be attributed to the word "structure" in section 54(9). In its ordinary significance the word certainly embraces anything built or constructed and so would cover any building. The question is whether its context here requires a narrower meaning to be attributed to it. The wider meaning could lead to some strange results. For example, if one house in an architecturally undistinguished terrace were listed as having once been the birthplace of an historically famous personage, it appears that all the houses in the terrace, being fixed to the listed building either directly or through each other, would require to be treated as part of it, as indeed might many other terraces connected to that one. Many other such examples may be figured. Notice of listing, under section 54(7), is required to be given only to the owner and occupier of the listed

A building itself, so the owner of some quite remote building might unwittingly undertake its demolition and become liable to penalties under section 55(1). The incongruous results which might follow from the decision in the *Calderdale* case were recognised by Stephenson L.J., giving the leading judgment in the Court of Appeal, 46 P. & C.R. 399, 405, but he took the view that the argument from incongruity was met by the fact that the listing building code of control did not prevent B demolition or alteration, but merely required consent to it. It is to be observed that the words in section 54(9) "any object or structure fixed to a building, or forming part of the land and comprised within the curtilage of a building" echo similar words in section 54(2), where, however, the words are prefaced by "man-made," and the relevant object or structure must be a feature of the building. It is, I think, clear C that in the context of section 54(2) the word "structure" is not intended to embrace some other complete building in its own right. This indicates that the draftsman of the relevant part of the Act has thought it appropriate to use the word in a narrow sense the first time that he introduced the quoted phrase, and it is a reasonable inference that he intended to use it in the same sense the second time. At all events, the result is to introduce an ambiguity into section 54(9), or perhaps more D accurately, to deepen the ambiguity which is there already. In resolving a statutory ambiguity, that meaning which produces an unreasonable result is to be rejected in favour of that which does not, it being presumed that Parliament did not intend to produce such a result. In my opinion to construe the word "structure" here as embracing a complete building not subordinate to the building of which it is to be treated as E forming part, would, in the light of the considerations I have mentioned, indeed produce an unreasonable result. Stephenson L.J. in the *Calderdale* case considered that objection to be offset by what he regarded as part of the purpose of the listing provisions, namely that of protecting the setting of an architecturally or historically important building. But if that was part of the purpose, it would have been to be expected that Parliament would not have stopped at other buildings fixed to or within F the curtilage of such a building, but would have subjected to control also buildings immediately adjoining but not fixed to the listed building, or on the opposite side of the street. All these considerations, and the general tenor of the second sentence of section 54(9) satisfy me that the word "structure" is intended to convey a limitation to such structures as are ancillary to the listed building itself, for example the stable block of G a mansion house, or the steading of a farmhouse, either fixed to the main building or within its curtilage. In my opinion the concept envisaged is that of principal and accessory. It does not follow that I would overrule the decision in the *Calderdale* case, though I would not accept the width of the reasoning of Stephenson L.J. There was, in my opinion, room for the view that the terrace of cottages was ancillary to the mill.

H The question thus comes to be whether the building 27/28 Kingly Street was at the material time ancillary to the building 200/202 Regent Street and 50/52 Kingly Street. The former was not of its nature ancillary to the latter, in the sort of sense that a steading is ancillary to a

farmhouse. It was historically an independent building. It is true that for a very considerable period of time both buildings were occupied and used together for the purposes of Hamley's toy shop, but throughout the rating year 1982/83 neither of them was being used for any purpose whatsoever, and indeed it must have been in contemplation that there would be no resumption of joint use, as is evidenced by the circumstance that in October 1982 steps began to be taken to sever the links between the two buildings with a view to 27/28 Kingly Street being sold off separately. These considerations tend to show that on a broad perspective 27/28 Kingly Street was not ancillary to the Regent Street building. The matter of listing or not listing cannot turn upon the business purposes or manner of use of adjoining properties of a particular occupier. Fox L.J., giving the leading judgment in the Court of Appeal in this case, said that 27/28 Kingly Street was really an annexe fixed to the rest of the hereditament. From the point of view of the occupier that may have been so, but the subordination of one building to another for the particular purposes of someone who happens for the time being to occupy both does not mean that objectively speaking and for the purposes of the listing legislation one of the buildings is ancillary to the other. In my opinion, 27/28 Kingly Street was an independent building and does not fall within section 54(9).

A large part of the argument for the appellants was directed to the proposition that the words in section 54(9) "for the purposes of the provisions of this Act relating to listed buildings and building preservation notices" had the effect that the enactment which followed them was not to be taken into account for the purposes of Schedule 1 to the General Rate Act 1967. In my opinion that proposition is ill-founded. The quoted words have the effect, for the purposes of the listed building provisions of the Act, of widening the definition of "building" in section 290(1) of the Act of 1971. No other effect can properly be attributed to them. It would be an absurd result, such as cannot have been intended by Parliament, if a structure subjected to listed building control by the Act of 1971, were to be treated as not so subjected for the purpose of some other Act dealing with the consequences of listing.

Having reached the conclusion that only the building 200/202 Regent Street and 50/52 Kingly Street is listed, and not the building 27/28 Kingly Street, it is necessary to consider whether or not paragraph 2(*c*) of Schedule 1 to the Act of 1967 as amended applies to that situation. The construction of paragraph 2(*c*) presents difficulty owing to the draftsman, as it would appear, not having kept in view the distinction between a hereditament and a building. It is buildings, not hereditaments which may be the subject of building preservation notices (under section 58 of the Act of 1971), and which are included in lists compiled under section 54. Although a hereditament may consist in a building and no more, there are a great many hereditaments which comprise a building and also something more, even if only a small garden or yard. Some hereditaments may comprise more than one independent building, as is the position here. "Hereditament" throughout paragraph 2 of Schedule 1 to the Act of 1967 must, in my opinion, be read as "relevant hereditament" as defined in paragraph 15. The Schedule is, after all,

dealing only with relevant hereditaments. So it is clearly in contemplation that a hereditament which attracts the exemption from rates afforded by paragraph 2 may be not only one which is a building and no more, but also one which is a building with a garden, yard, court or other land ordinarily used for the purposes of the building. It follows that the presence of such garden etc. would not deprive the hereditament of the exemption, notwithstanding that it is only the building, and not the whole hereditament, which, for example, is included in a list compiled under section 54 of the Act of 1971. Likewise, the presence of some ancillary structure such as a garage or outhouse, either fixed to the main building or within its curtilage, would not affect the exemption since by virtue of section 54(9) such ancillary structure would fall to be treated as part of the building.

The position in the present case is that the hereditament comprises two independent buildings, one of which is listed and the other of which is not. In the event that one of the buildings, but not the other, were the subject of a building preservation notice made under section 58 of the Act of 1971, it could be said, without any undue straining of language, that the hereditament as such was the subject of the notice, even though the notice applied to part only of it. If one only of two buildings on the hereditament were included in a list compiled under section 54, it could surely not be said that the hereditament as such was included in the list. On the other hand, it is not likely that Parliament would have intended to treat the two cases differently. Paragraph 2 should be construed so as to accord the same treatment to both. In making the choice between the stricter and the more liberal constructions some assistance can, in my opinion, be derived from paragraph 3 of Schedule 1, which provides:

> "The Minister may by regulations provide that rates shall not be payable under paragraph 1 of this Schedule in respect of hereditaments of such descriptions as may be prescribed by the regulations or in such circumstances as may be so prescribed and the regulations may make different provision for hereditaments of different descriptions and for different circumstances."

This provision enables the Minister to enlarge the classes of hereditaments in respect of which the exemption is afforded. It does not enable him to restrict it. There would seem to be nothing to prevent the Minister, if so advised, from prescribing by regulations hereditaments comprising both a listed and unlisted building in relation to which the value of the listed building amounted to more than some specified proportion of the value of the whole hereditament. It might seem unfair that exemption should be denied where the value of the listed building accounted for a very large proportion of the value of the whole hereditament. Yet from the other point of view it might seem unreasonable that exemption should be afforded where the value of the listed building formed a very small proportion of the total value. The Minister has been given power which would enable him to alleviate the former anomaly but not the latter. Accordingly paragraph 3 is an indication in favour of the view that

Parliament intended the stricter construction of paragraph 2(*c*) of Schedule 1 to the Act of 1967.

In *Providence Properties Ltd. v. Liverpool City Council* [1980] R.A. 189, a Divisional Court consisting of Lord Lane C.J. and Boreham J. had occasion to consider the scope of the paragraph 2(*c*) exemption in relation to a hereditament which comprised three warehouses, one of which was listed and the other two of which were not. It was decided that the exemption was not available to a hereditament part only of which was listed. The reasoning was that if Parliament had intended to afford the exemption to such a hereditament it would have done so in express terms. There is much force in that view of the matter, and taken in conjunction with the other considerations set out above it must, in my opinion, determine the issue in favour of the appellants.

My Lords, for these reasons I would allow the appeal and restore the adjudication of the stipendiary magistrate and the distress warrant. The questions posed in the case stated do not deal exhaustively with the issues raised in the appeal. They should be answered in the affirmative, but in addition it should be found that on a true construction of paragraph 2 of Schedule 1 to the Act of 1967 as amended exemption from rates is not available to the respondents' hereditament in respect of the rating year 1982/83.

Lord Templeman. My Lords, for the reasons given by my noble and learned friend, Lord Keith of Kinkel, I agree that this appeal should be allowed and that this House should make the findings he has proposed.

Lord Griffiths. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Keith of Kinkel and Lord Mackay of Clashfern. I agree with them, and for the reasons which they give I would allow the appeal.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Keith of Kinkel and Lord Ackner.

I agree with both, that the principal argument relied upon by the appellants in the present case is ill-founded. I agree with my noble and learned friend Lord Keith of Kinkel that this appeal should be allowed for the reasons which he has given. Since I differ from my noble and learned friend Lord Ackner on this aspect of the appeal and also from the unanimous judgment of the Court of Appeal [1986] R.A. 114 I shall add some observations.

Although the question in this appeal arises in the context of relief from rates on unoccupied property, the point that has divided us is of considerable importance in the administration of the system of listed building control now governed by the provisions of the Town and Country Planning Act 1971.

By the first part of section 54(9) for the purposes of the Act of 1971 "listed building" means a building which is, for the time being, included in a list compiled or approved by the Secretary of State under the section. The list so compiled or approved is to be a list of buildings of

special architectural or historic interest. Since it is obviously necessary that the list should identify the buildings contained in it, the question whether a particular physical entity is listed or not listed depends upon whether on reading the list and taking account of the statutory provisions that entity is to be regarded as a building or part of a building included in the list. In the present case the contention for the respondents is that the entry in the list under the heading "Regent Street, W.1. (East Side) Nos. 172 to 206 (even)" meant not only that the building which has the address 200/202 Regent Street, and since it physically carries through to Kingly Street also has the address 50/52 Kingly Street and which I shall refer to as "the Regent Street building," was included in the list, but also that a building on the opposite side of Kingly Street, namely 27/28 Kingly Street which I shall refer to as "the Kingly Street building," was in the list. If this contention is correct, inevitably a considerable number of other buildings in Kingly Street, in Foubert's Place, in Carnaby Street and in Fuch's Place, which were included in the block of which the Kingly Street building formed part, were also included in the list. If the intention of the Secretary of State in compiling or approving this list was to include all these buildings in it one would have expected the entry to have clearly included them. If the effect of the action taken by the Secretary of State was that all of these buildings should be included, in my opinion the entry in the list is positively misleading.

The magistrate found that the entry in the list referred and referred only to the Regent Street building and did not extend to the Kingly Street building. He has asked for the opinion of the court whether he erred in law in so holding. The respondents urge that he was wrong and the reason for this submission is the second part of section 54(9) which provides that:

> "for the purposes of the provisions of this Act relating to listed buildings and building preservation notices, any object or structure fixed to a building, or forming part of the land and comprised within the curtilage of a building, shall be treated as part of the building."

Before considering this submission further I think it is necessary to refer to the definitions of "land" and "building" provided in the interpretation section, section 290(1) of the Act of 1971:

> "'land' means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part VI of this Act, includes any interest in or right over land;

and:

> "'building' (except in sections 73 to 86 of this Act and Schedule 12 thereto) includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building; . . ."

Cases under the Income and Corporation Taxes Act 1970 demonstrate that the word "plant" is a word of very extensive import and it is obvious that plant or machinery could be fixed to a building and might include structures so fixed.

The statutory provision which is now the latter part of section 54(9) first appeared in the Town and Country Planning Act 1968. As an illustration of a question that had arisen prior to that statutory provision which might throw light on the reason for its insertion in the legislation in 1968 your Lordships were referred to the decision of Russell L.J. sitting as an additional judge in the Queen's Bench Division in *Corthorn Land and Timber Co. Ltd. v. Minister of Housing and Local Government* (1965) 17 P. & C.R. 210. In that case a building preservation order had been made in respect of a mansion of outstanding architectural merit. The building preservation order provided, inter alia, that the mansion should not, without the consent of the planning authority be demolished, altered or extended and that the following items, inter alia, should not be altered or removed:

> "1. 27 portrait panels in the King's room being 19th century copies of Tudor and Stuart Kings and Queens. 2. Carved oak panels in the wall of the Oak Room dating from the 15th to mid 17th centuries. 3. A large wood carving in the Great Hall. 4. Large wooden medieval equestrian figures on the main landing. 5. A pair of painted wooden panels depicting the Hall in the ornate mantelpiece in one of the drawing rooms."

The owner applied to quash the building preservation order on the ground that the above mentioned items were not properly included in it. It was held that any chattel which was affixed definitely to a building became part of the building; that there was no doubt that the items in dispute were all fixed and annexed in their places as part of an overall and permanent architectural scheme and were intended in every sense to be annexed to the freehold, and were accordingly part of the building; and that, in these circumstances, the restriction on their removal was properly made. Russell L.J. after saying that he did not propose to detail the effect of the evidence laid before him as to the methods of fixing employed in relation to the various items in dispute said, at 17 P. & C.R. 210, 213: "it suffices to say that all the items would properly be described as fixtures as that phrase is commonly applied in law." Russell L.J. went on to quote from a number of authorities which can be summarised by saying that the ancient rule of the common law was that whatever is planted or built in the soil or freehold becomes part of the freehold or inheritance, thus a house becomes part of the land on which it stands and anything annexed or affixed to any building (not merely laid upon or brought into contact with the building) was treated as an addition to the property of the owner of the inheritance in the soil and was termed a "fixture." This rule of the common law was relaxed in favour of trade to enable tenants to affix their machinery or plant to a building or to the land and not thus make a present of it to the landlord, so that machinery or plant fixed to the inheritance for the purposes of trade may be removed by the tenant during the tenancy under certain conditions.

In the Act of 1971 the general definition of "building" excludes from its scope plant and machinery. Certain items that otherwise would be "fixtures" and form part of the building are therefore excluded. Against

this background it appears to me that the word "fixed" is intended in section 54(9) to have the same connotation as in the law of fixtures and that what is achieved by the latter part of section 54(9) is that the ordinary rule of the common law is applied so that any object or structure fixed to a building should be treated as part of it. The provision is dealing with the question whether certain things, namely objects or structures, are to be treated as part of a building, not whether what is undoubtedly a building or part of a building is to be regarded as part of another building. The use of the indefinite article in describing the subject matter of the provision tends to suggest this, in my opinion. The result would be to put beyond question the matter that was decided by Russell L.J. in the *Corthorn* case and I consider that in its context this is the natural interpretation of the provision. I think it is not a natural use of language to describe two adjoining houses in a terrace by saying that one is an object or structure fixed to the other. It would, I think, be a perfectly appropriate provision in a contract for the sale of a house that there was included in the sale any object or structure fixed to the house but I think it highly unlikely that the purchaser would expect under the terms of such a contract to become the owner of the house next door, with which it shared a mutual wall.

The respondents' contention involves reading the word "structure" in its context as including a completely distinct building which is connected structurally to the first building. This reading seriously restricts the power of the Secretary of State in relation to listed buildings since on this view he could not select one out of a terrace of houses nor could he select a part of a building to be listed. Part of a building necessarily is fixed in the sense contended for to the rest of the building. It is suggested that having regard to the purpose of the Act of 1971 no harm is done by forcing the Secretary of State if he wishes to list a building in a terrace to list the whole terrace since in respect of the buildings in the terrace not of architectural or historic interest permission for alteration or demolition could readily be given. However, section 54(2)(*a*) gives ample power to the Secretary of State if he chooses to list the whole terrace in respect of architectural or historic interest possessed by the whole; and the suggestion involves a compulsory notification to the owners of the whole terrace that their houses have been included in the list in view of the terms of section 54(7). I consider the respondent's construction is hard to reconcile with the provisions of section 190 of the Act of 1971 dealing with the service of a purchase notice when listed building consent has been refused, conditionally granted, or modified. In certain circumstances the owner may require the listed building to be purchased. Section 190(3) provides:

> "In this section and in Schedule 19 to this Act, 'the land' means the building in respect of which listed building consent has been refused, or granted subject to conditions, or modified by the imposition of conditions, and in respect of which its owner serves a notice under this section, together with any land comprising the building, or contiguous or adjacent to it, and owned with it, being land as to which the owner claims that its use is substantially inseparable from

that of the building and that it ought to be treated, together with the building, as a single holding." A

This seems to envisage that a listed building will normally constitute a single holding.

In my opinion it is inconsistent with this provision to interpret section 54(9) as having the effect that if the Secretary of State lists one building in a terrace the consequence is that all the other buildings in B the terrace which are distinct from the listed building and are owned separately from it and from one another and whose uses are completely independent from that of the listed building are to be treated as part of the listed building.

I see no practical difficulty in the operation of the Act of 1971 on the construction which appears to me to be correct. If a listed building is C extended the extension will form part of the listed building without any need to rely on section 54(9). So far as buildings are concerned which exist at the date of the listing the Secretary of State will have the right to include or exclude without being constrained to include by reason of physical connection between a building he wishes to include and one he wishes to exclude.

Applying these considerations to the present case leads me to the D conclusion that the magistrate decided it correctly. He concluded that what is found in the list was intended to refer only to the Regent Street building and was not intended to include the Kingly Street building. I consider that he was not bound to hold that the Kingly Street building was a structure fixed to the Regent Street building. It was a completely distinct building which at the end of the period in respect of which E exemption was in question was completely separate from the Regent Street building and even when connected to it by footbridge and tunnel it was not a structure fixed to it within the meaning of section 54(9). The magistrate was not, in my opinion, in any way bound to hold that the Kingly Street building was within the curtilage of the Regent Street building as it was separated from that at ground level by a public street, although, for rating purposes, when the buildings were in common F occupation they were treated as a single hereditament. The effect of the respondents' contention, in my opinion, is to say that the list compiled or approved by the Secretary of State included not only the Regent Street building but also the Kingly Street building. The list so long as it remained unaltered therefore included the Kingly Street building even after the footbridge was demolished and the tunnel was closed and the G two buildings were completely distinct and separated by a public road. If the Secretary of State should now decide that the Kingly Street building should be deleted from the list it is not entirely clear to me what action he could take to achieve this purpose. The same consideration applies to all the other buildings in the block, of which the Kingly Street building forms part. According to the respondents' contention, as I have already said, these were all listed when 200/202 Regent Street was inserted in H the list and notice should have been served on the owners of all these properties in terms of section 54(7) that they were so included. If this were truly the position the only proper course, in my opinion, would

have been to include their addresses in the list along with 200/202 Regent Street. The concept of a building impliedly in the list when it consists of premises distinct from those whose address is given in the list seems to me calculated to lead only to confusion in a case where the list is a document which requires to be registered in the register of local land charges and which should, consequently, have the precision necessary to enable a person inspecting that register to appreciate all the subjects to which it relates.

In my opinion, *Attorney-General ex rel. Sutcliffe v. Calderdale Borough Council*, 46 P. & C.R. 399, is a very special case on its facts and I believe that it was possible to treat the terrace and the mill, having regard to the history of the properties, as a single unit. At the time the listing was made the whole property was in one ownership and therefore when the mill was included a notice to that effect was served on the only person who was interested as owner in the terrace. For the reasons which I have already given, I cannot regard, with respect, the reasoning by which the Court of Appeal in that case reached its conclusion as according with the true construction of section 54(9) of the Act of 1971.

Lord Ackner. My Lords, when Mr. Graham Eyre opened this appeal, he submitted to your Lordships, consistent with the appellants' written case, that the appeal only raised one question and that this question, although wrongly answered by the Court of Appeal, had been properly formulated by Fox L.J. in the course of his judgment, with which Neill and Ralph Gibson L.JJ. concurred. The question was:

> "Can a building which is treated as part of the listed building by the provisions of section 54(9) be properly regarded as 'included in a list compiled or approved under section 54 of the Town and Country Planning Act 1971?'"

Neither in the Court of Appeal nor in his case nor before your Lordships' House did Mr. Eyre seek to suggest that if that question, contrary to his submissions, was answered in the affirmative the appeal could succeed on any other ground, or that it gave rise to any other issue. Until invited by your Lordships to consider the matter, he did not suggest that the Court of Appeal was in error in their following conclusions:

> (a) that 27/28 Kingly Street was a 'structure fixed to' 200/202 Regent Street, the building expressly included in the list, and (b) that 27/28 Kingly Street was a 'structure forming part of the land and comprised within the curtilage' of that listed building.

And accordingly by reason of the provision of section 54(9) of the Act of 1971 27/28 Kingly Street was to be treated as part of 200/202 Regent Street.

Hodgson J. [1985] R.A. 265, and the Court of Appeal [1986] R.A. 114, in reaching their decisions on the above two matters, derived assistance from *Attorney-General ex rel. Sutcliffe v. Calderdale Borough*

Council, 46 P. & C.R. 399, in which the leading judgment was given by Stephenson L.J. and with which Sir Sebag Shaw and I concurred. Mr. Eyre, neither in his case nor in your Lordships' House, until invited to do so, sought to criticise that decision. He submitted that the essential issue in the *Calderdale* case was whether the terrace in question was subject to the statutory control of works of demolition, under section 55 of the Act of 1971. He submitted that the Court of Appeal in that case did not have any reason to consider the provisions of Schedule 1 to the General Rate Act 1967 relating to the exemption from rates in respect of an unoccupied hereditament included in a list compiled or approved under section 54 of the Act of 1971. He maintained that there was no conflict between that case and *Providence Properties Ltd. v. Liverpool City Council* [1980] R.A. 189. Mr. Eyre contended that the question as to what is or is not a "listed building" or what is or is not to be treated as part of such a building for the purpose of the provisions of the Act of 1971 is wholly irrelevant to the question whether a hereditament is exempt, by virtue of paragraph 2(*c*) of Schedule 1 to the General Rate Act 1967, as being "included in a list compiled or approved by the Secretary of State under [section 54 of the Act of 1971.]"

Mr. Eyre's contention was that the words in section 54(9) "for the purposes of the provisions of this Act relating to listed buildings" confined the effect of what is provided in the subsection—namely the widening of the definition of "listed building"—to the provisions of the Act of 1971. It could not be taken into account for the purposes of Schedule 1 to the General Rate Act 1967. I entirely agree with the view expressed by my noble and learned friend Lord Keith of Kinkel, whose speech in draft I have had the privilege of reading, that this proposition is ill-founded. If a structure is by virtue of the Act of 1971 to be treated as a part of a building which has been expressly included in the list, it cannot cease to be so treated for the purposes of some other Act which itself makes special provision (exemption from rates in certain circumstances) for buildings which are included in the list.

The fact that the appellants were willing to accept the Court of Appeal's construction of the words "structure" as used in section 54(9) of the Act of 1971 and their almost total absence of enthusiasm in espousing the critical comments of that decision made by your Lordships during the course of argument, is not and cannot in any sense be decisive of the point. If the Court of Appeal in the *Calderdale* case and in the instant appeal has misinterpreted those words, then your Lordships must so declare. However, the course which the appellants' argument took, particularly when they stressed at the outset of the appeal the importance of their success in the appeal, is not lightly to be dismissed. It certainly suggests that if the Court of Appeal was in error in the *Calderdale* case and/or in this case that error is not easily discernible. For the reasons which I now set out I am unable to discern the error and accordingly I would have dismissed this appeal.

(1) *The literal interpretation of the words "structure fixed to . . ."*

It has at no time been disputed that "structure" in its ordinary everyday sense includes a building. Section 290 of the Act of 1971 is the

definition section. It does not define "structure." It provides, however, that except so far as the context otherwise requires, building "includes any structure or erection and any part of a building, as so defined, but does not include plant or machinery comprised in a building." Thus, the power given by section 54 of the Act of 1971 to the Secretary of State to compile lists of buildings of special architectural or historic interest, includes the power to list a part only of a building. Thus, it is accepted that if the Secretary of State should include in the list only the facade of a building, as indeed we are told he does from time to time, then by virtue of section 54(9) the whole building, that is the structure of which the facade is but a part, falls to be treated as part of that which is expressly included in the list, i.e. the facade.

But in the example given above, what is the building? The facade, the "listed building," may only extend across part of the face of the original building, let alone the original building as subsequently extended. Clearly on a literal interpretation of the words of subsection (9) every part of the building, original or extended, is "a structure fixed to" the listed building, the facade, and is by virtue of the subsection to be treated as part of the facade. Thus far, I believe, there is no dispute. Yet to treat such a structure as ancillary or subordinate or as a feature of the facade would, to my mind, be quite unrealistic.

Approaching the matter from another angle, one can well envisage a listed Georgian mansion, far too large to provide a convenient private residence, whose optimum or most profitable use, bearing in mind its situation and the size of its grounds, is that of a high class hotel. However, for such a development considerable extensions and alterations are necessary to provide more bedroom accommodation, conference halls and other facilities. Clearly such alterations and extensions would affect the character of the Georgian mansion and accordingly listed building consent would be required (see section 55). If the consent were to be given on terms, inter alia, that the extensions should be achieved by building two extensive wings onto the Georgian mansion, again quite clearly on a literal interpretation of the words of the subsection the wings, when built, would fall to be treated as part of the Georgian mansion.

However, assume that the extra accommodation which is contemplated as being necessary to make the development a success, would so dwarf the listed building, if it were to consist of two wings built onto the listed building, that listed building consent is only given on terms that two large buildings were erected on either side of the listed building, but each connected thereto with a bridge. Again, applying the ordinary meaning to the word "structure," each of those new buildings would by reason of the terms of section 54(9) be treated as part of the listed building.

(2) *The purposive approach*

The purpose of "listing" buildings is to ensure the protection and enhancement of the local heritage of buildings. This is achieved by making it an offence for a person to execute "any works for the demolition of a listed building or for its alteration or extension in any

manner which would affect its character as a building of special architectural or historic interest:" section 55(1). To confine this control to the building which is expressly included in the list, because of its special architectural or historic interest, may be often quite insufficient—the example of the Georgian facade referred to above is but one obvious example. Hence the extended definition of "listed building" contained in section 54(9). If the two additional buildings connected to the Georgian mansion in the example given above are not, when built, to be treated as part of the mansion, the purpose of the Act would be frustrated. Listed building consent would not have been necessary in the first instance and demolition of *one* of the new buildings, thereby destroying the whole harmony of the development, could take place at the whim of the owner. It is common ground that no planning permission would be required for such demolition and that the building by-law control is only designed to ensure that the physical stability of the remaining building is not affected, that control not being concerned with aesthetics.

Thus, both the ordinary meaning of the words used in section 54(9) and the very purpose of the legislation strongly support the proposition that the word "structure" covers any building and therefore includes 27/28 Kingly Street. It is not disputed that it was "fixed to," that is joined onto 200/202 Regent Street both by the underground tunnel and by the footbridge. Moreover, it formed part of the land and was comprised within the curtilage of 200/202 Regent Street.

(3) *Does the context require a different meaning from that normally associated with the ordinary use of the word?*

In the *Calderdale* case, 46 P. & C.R. 339, there was a terrace of cottages, a mill and a bridge which linked the two. The mill was expressly included in the list but the terrace was not. The issue was: was listed building consent necessary for the demolition of the terrace? Skinner J., dealing with the first limb of section 54(9) held that the terrace was not a "structure fixed to" the mill on the ground, not argued by counsel or put to them by the judge, that the terrace could not be both fixed to the mill and comprised in the curtilage of the mill and that the two alternative limbs of section 54(9) were mutually exclusive. He then proceeded to give his reasons for holding that the terrace was within the curtilage of the mill. The Court of Appeal rejected this proposition, concluding that a structure can be both fixed to a listed building and comprised within its curtilage, as indeed had been common ground before the judge. No reliance was placed in your Lordships' House on this aspect of Skinner J.'s decision.

Skinner J.'s interpretation of the first limb of the section 54(9) was designed to avoid what he considered was the incongruity of deciding, in accordance with the ordinary sense of the words of the subsection, not only that the first of the cottages was fixed to the mill but so was the whole terrace.

Stephenson L.J. in the *Calderdale* case expressly accepted that the literal construction could give rise to incongruity. He said, at p. 405:

> "A multiple store adjacent to the birthplace of a statesman might have to be treated as part of the birthplace because it was a

A structure fixed to it. A block of flats replacing the stables of a mansion house might have to be treated as part of the mansion because they are within the curtilage of the mansion."

However he concluded, rightly in my judgment, that the theoretical absurdities are fairly met by the nature of the control imposed on listed buildings and all their parts, actual and deemed. The code of listed B building control does not *prevent* demolition or alteration or extension. It merely requires *consent* to such works. As Mr. Eyre emphasised, there is likely to be far less difficulty in obtaining permission to demolish, alter or extend a structure fixed to a building, which has not been expressly referred to in the list, since ex hypothesi it is not of itself of sufficient architectural or historic interest to merit specific mention.

C In the *Calderdale* case a subsidiary argument, not taken before the judge, was raised in the notice of appeal. This argument, which was rejected by the Court of Appeal and not in terms adopted by Mr. Eyre in your Lordships' House has apparently found some favour with your Lordships. As I understand it, it proceeds as follows.

Section 54(2) of the Act of 1971 provides:

D "In considering whether to include a building in a list compiled or approved under this section, the Secretary of State may take into account not only the building itself but also— . . . (*b*) the desirability of preserving, on the ground of its architectural or historic interest, *any feature of the building consisting of* a man-made object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building." (Emphasis added.)

E The submission in the *Calderdale* case was that the words which I have emphasised were intended by the draftsman to be included in section 54(9) immediately prior to the words "any object or structure fixed to a building" thereby qualifying and very substantially limiting the ordinary meaning, inter alia, of the word "structure" to a mere feature or characteristic of the building which has been expressly listed. Thus the words in section 54(9), with which your Lordships are concerned, F are said to be mere shorthand for the words in section 54(2)(*b*).

I cannot attribute to the draftsman of section 54 some invincible repugnance to repeat in subsection (9) some eight words which he had used in an earlier subsection of the same section. The words in section 54(2)(*b*) are used in a quite different context, namely in the context of the factors, other than the building, which the Secretary of State may G take into account when considering whether or not to include a building in the list. Section 54(2)(*b*) empowers the Secretary of State to list a building which may have little or no architectural or historic interest if it includes a special feature, e.g. a staircase, a painted ceiling or a 17th century folly within its grounds. That subsection is not concerned with extending the definition of "listed building." If such a narrow construction is acceptable then it really defeats the purpose of the Act of 1971.

H However, I do not understand your Lordships to limit "structures" to mere features or characteristics of the building expressly included in the list. Your Lordships are prepared to accept that "structure" has a wider meaning and includes a separate building, providing it is ancillary or

subordinate or an accessory to the building expressly included in the list. Your Lordships would not therefore overrule the decision in the *Calderdale* case, that the terrace of cottages were a "structure fixed to" the mill, but would not accept the width of the reasoning of Stephenson L.J.

The only support for this approach appears to me to be a combination of the language of 54(2)(*b*) and the incongruity argument. With all proper respect, I cannot accept that this provides sufficient justification for departing so radically from the ordinary meaning of the words in section 54(9) and the very purpose for which they were used.

However, to my mind, even on that interpretation, 27/28 Kingly Street qualified to be treated as part of 200/202 Regent Street. It was attached to the main shop in order to extend its shopping facilities. Understandably listed building consent was thought to be necessary for the removal of the connecting footbridge and this was accordingly applied for and granted prior to its demolition in March 1983. 27/28 Kingly Street was used as a subordinate part of the main shop and an ancillary thereto. It was, as Fox L.J. aptly described it—an annexe. It is thus in no way surprising that it, together with the main shop 200/202 Regent Street, formed a single hereditament for rating purposes.

Appeal allowed.

Solicitors: Solicitor, Westminster City Council; Forsyte Kerman.

C. T. B.

[HOUSE OF LORDS]

REGINA . . . . . RESPONDENT

AND

HOWE . . . . . APPELLANT

REGINA . . . . . RESPONDENT

AND

BANNISTER . . . . . APPELLANT

REGINA . . . . . RESPONDENT

AND

BURKE . . . . . APPELLANT

[CONJOINED APPEALS]

REGINA . . . . . RESPONDENT

AND

CLARKSON . . . . . APPELLANT

1986 Nov. 17, 18, 19, 20;
1987 Feb.19

Lord Hailsham of Marylebone L.C.,
Lord Bridge of Harwich,
Lord Brandon of Oakbrook,
Lord Griffiths and Lord Mackay of Clashfern

Crime—Homicide—Duress as defence—Murder—Principals in first and second degree—Defence of duress not available to either—Whether conviction for murder of person exercising duress maintainable if person under duress convicted of manslaughter only—Whether test of reasonable man applicable in duress

Crime—Homicide—Procuring or inciting murder—Person procured alleging duress and accidental killing—Both person procured and procuror charged with murder—Whether, if person procured only guilty of manslaughter, procuror still guilty of murder

In the first appeal, the two appellants with an intended victim were driven by M. to an isolated area where the appellants and M. assaulted the victim and then M. killed him. On a second similar occasion the appellants jointly strangled a victim. On a third occasion, the intended victim escaped. The appellants were tried on indictment on two counts of murder and one of conspiracy to murder. Their defence was that they feared for their own lives if they did not do as M. directed. The judge left the issue of duress to the jury in respect of the first murder committed by M. and the conspiracy to murder but not on the count of murder where the victim was strangled by the appellants. He directed the jury that the test of duress was whether a sober person of reasonable firmness sharing the appellants' characteristics would have responded to the threats by taking part in the killing. The appellants were convicted on the three counts.

In the second appeal, the appellants Burke and Clarkson were tried on a charge of murder of a man killed by Burke. Burke's defence was that he had agreed to shoot the victim because of fear that Clarkson would kill him if he did not do so but that the gun went off accidentally. The judge directed the jury that Burke, as the actual killer, could not rely on duress as a defence to the charge of murder but he left the issue of duress to the jury on the issue whether Burke's act was unintentional so that the offence committed amounted to manslaughter. He further directed the jury that if they found that Burke was guilty of manslaughter, Clarkson could at most be convicted of that offence. Both appellants were convicted of murder.

The four appellants appealed against conviction. Their appeals were heard together and were dismissed by the Court of Appeal.

On appeal by the appellants:—

Held, dismissing the appeals, that it was not a defence to a charge of murder that the accused had acted under duress in order to protect his own life or that of his family; that, accordingly, the defence was not available to the person who actually killed the victim and it was also not available to those who had participated in the murder as principals in the second degree; and that, therefore, the appellants had been rightly convicted of murder (post, pp. 436A–B, 437E—438B, C, 445D–F, 453D–G, 456B—457A).

Reg. v. Dudley and Stephens (1884) 14 Q.B.D. 273 and *Abbott v. The Queen* [1977] A.C. 755, P.C. applied.

Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653, H.L.(N.I.) overruled.

Held, further, that in circumstances where a defendant had procured or incited another to commit murder but that person was convicted of manslaughter, the defendant could be convicted of the murder of the victim; and that, therefore, the judge had erred in law in directing the jury that if they found Burke guilty of manslaughter, they could not convict Clarkson of murder (post, pp. 426A–C, 436A–B, 438B–C, 446A–B, 458C–D).

Reg. v. Richards [1974] Q.B. 776, C.A. overruled.

Per curiam. In offences where the defence of duress is available, the test to be applied is whether the threat was of such gravity that it might well have caused a reasonable man placed in the same situation to act in the same way as the defendant had acted, and whether a sober person of reasonable firmness sharing the defendant's characteristics would have responded to the threat by taking part in the killing (post, pp. 426C–E, 436A–B, 438B–C, 446A–B, 458D–F, 459B–D).

Reg. v. Graham (Paul) [1982] 1 W.L.R. 294, C.A. approved.

Decision of the Court of Appeal (Criminal Division) [1986] Q.B. 626; [1986] 2 W.L.R. 294; [1986] 1 All E.R. 833 affirmed on different grounds.

The following cases are referred to in their Lordships' opinions:

Abbott v. The Queen [1977] A.C. 755; [1976] 3 W.L.R. 462; [1976] 3 All E.R. 140, P.C.

Anderton v. Ryan [1985] A.C. 560; [1985] 2 W.L.R. 968; [1985] 2 All E.R. 355, H.L.(E.)

Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653; [1975] 2 W.L.R. 641; [1975] 1 All E.R. 913, H.L.(N.I.)

Myers v. Director of Public Prosecutions [1965] A.C. 1001; [1964] 3 W.L.R. 145; [1964] 2 All E.R. 881, H.L.(E.)
Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.)
Reg. v. Bourne (1952) 36 Cr.App.R. 125, C.C.A.
Reg. v. Brown and Morley [1968] S.A.S.R. 467
Reg. v. Cogan [1976] Q.B. 217; [1975] 3 W.L.R. 316; [1975] 2 All E.R. 1059, C.A.
Reg. v. Dudley and Stephens (1884) 14 Q.B.D. 273
Reg. v. Fitzpatrick [1977] N.I. 20
Reg. v. Graham (Paul) [1982] 1 W.L.R. 294; [1982] 1 All E.R. 801, C.A.
Reg. v. Hindawi (unreported), 24 October 1986, Central Criminal Court.
Reg. v. Hudson [1971] 2 Q.B. 202; [1971] 2 W.L.R. 1047; [1971] 2 All E.R. 244, C.A.
Reg. v. Hyam [1975] A.C. 55; [1974] 2 W.L.R. 607; [1974] 2 All E.R. 41, H.L.(E.)
Reg. v. Kray (Ronald) (1969) 53 Cr.App.R. 569, C.A.
Reg. v. Richards [1974] Q.B. 776; [1973] 3 W.L.R. 888; [1973] 3 All E.R. 1088; 58 Cr.App.R. 60, C.A.
Reg. v. Shivpuri [1987] A.C. 1; [1986] 2 W.L.R. 988; [1986] 2 All E.R. 334, H.L.(E.)
Reg. v. Tyler and Price (1838) 8 C. & P. 616
S. v. Goliath, 1972 (3) S.A. 1, 465
Woolmington v. Director of Public Prosecutions [1935] A.C. 462, H.L.(E.)

The following additional cases were cited in argument:

Reg. v. Darrington and McGauley [1980] V.R. 353
Reg. v. Gillard; Reg. v. King (unreported), 28 July 1983, Sheldon J. at Exeter
Reg. v. Harding [1976] V.R. 129
Reg. v. Knuller (Publishing, Printing and Promotions) Ltd. [1973] A.C. 435; [1972] 3 W.L.R. 143; [1972] 2 All E.R. 898, H.L.(E.)
Reg. v. McConnell [1977] 1 N.S.W.L.R. 714

APPEALS from the Court of Appeal.

These were appeals, by leave of the Court of Appeal (Criminal Division) (Lord Lane C.J., Russell and Taylor JJ.) [1986] Q.B. 626 from their decision upholding the convictions of the appellants, Michael Anthony Howe and John Derek Bannister, in the Crown Court at Manchester before Jupp J. and a jury on 28 January 1985 on counts of murder and conspiring with others to murder, contrary to section 1 of the Criminal Law Act 1977; and upholding the convictions of the appellants, Cornelius James Burke and William George Clarkson, at the Central Criminal Court before the Common Serjeant of London (Judge Tudor Price) and a jury on 16 October 1984 on a count of murder.

The facts are set out in their Lordships' opinions.

Michael Self Q.C., Roy Warne and *Peter Crichton-Gold* for the appellants Howe, Bannister and Burke. On the question whether duress is available as a defence to a person charged with murder as a principal in the first degree (the actual killer), it is clear that the doctrine of duress has moved since the days of Blackstone. The principle established in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975]

A.C. 653 is clear and its logic should extend to the present appeal. In the Lynch case the House held that the defence of duress is available to a person charged with murder as an aider and abettor. The defence should be available to a defendant charged with murder as the actual killer for the following reasons. (i) It is illogicial to allow the defence to an aider and abettor to murder but to deny it to a principal in the first degree. No acceptable basis of distinction exists. A secondary party may be more culpable than the actual killer. (ii) If the defence is denied to the actual killer yet allowed to the aider and abettor it will always be necessary, in relation to any particular defendant charged with murder, to ascertain his degree of participation in the killing. To do so may import absurdity and inconsistency into the law (see, e.g., *Reg. v. Graham (Paul)* [1982] 1 W.L.R. 294). (iii) To deny the defence to the actual killer does not make for sounder law or better ethics. A defendant charged with attempted murder, or under section 18 of the Offences against the Person Act 1861, may undoubtedly rely upon the defence of duress and may be acquitted. If the victim subsequently dies, the defendant may be charged with murder and convicted, without the benefit of the defence. (iv) to withhold the defence from the actual killer may create grave injustice, as where an aider and abettor who relies successfully upon the defence is totally acquitted, whilst the actual killer who has acted under duress is sentenced to imprisonment for life. Conversely, to allow the defence of duress would ensure that the evidence is fully brought out before the jury. (v) Current opinion is in favour of the general application of the defence, as recommended by the Law Commission Report, Criminal Law, Report on Defences of General Application (Law Com. No. 83), dated 27 July 1977, which was not available when the *Lynch* case and *Abbott v. The Queen* [1977] A.C. 755 (the dissenting speeches of which are relied on) were considered. There is no direct English judicial authority against the availability of the defence of duress to the actual killer. Current commentaries on the law tend to support the extension of duress as a defence for an actual killer. Further, the defence of duress was put before the jury in *Reg. v. Gillard; Reg. v. King* (unreported), 28 July 1983, in relation to an actual killer.

Although *Reg. v. Dudley and Stephens* (1884) 14 Q.B.D. 273 shows that necessity is not a defence, the law of necessity is by no means established as such, unlike duress, which is firmly established as a defence. [Reference was also made to *Reg. v. Fitzpatrick* [1977] N.I. 20, where the defence was held not to apply to crimes committed under duress applied by an illegal organisation which the defendant had voluntarily joined]. The opening of the door for the defence began in *Reg. v. Kray (Ronald)* (1969) 53 Cr.App.R. 569; and two years later *Reg. v. Hudson* [1971] 2 Q.B. 202 held that duress applied to all cases except possibly treason or murder by the principal. The door was swept wide open by the *Lynch* case, but shut a year later by the persuasive authority of the majority of the Privy Council in the *Abbott* case. [Reference was also made to *Reg. v. Harding* [1976] V.R. 129; *Reg. v. McConnell* [1977] 1 N.S.W.L.R. 714 and *Reg. v. Darrington and McGauley* [1980] V.R. 353]. To not extend the defence to the actual

killer would make for injustice in that the aider and abettor is able to rely on it. (Their Lordships cannot allow the defence of duress to reduce murder to manslaughter, as in the defence of provocation, as in all other offences the defence of duress is a complete defence, and there would therefore be introduced a unique element into the criminal law.)

On the question whether the defence of duress failed if the prosecution proved that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant, *Reg. v. Graham (Paul)* [1982] 1 W.L.R. 294 is wrongly decided on this point and should be overruled. The test should be purely subjective and the defendant should be judged on the basis of what he honestly and actually believed and feared. The tests of reasonableness averred to in *Reg. v. Graham (Paul)* are wrong because (a) it is contrary to principle to require the defendant's fear to be a reasonable one, for to do so punishes the weak who have succumbed to threats; and (b) likewise to require that the defendant's action be judged against the objective test of a sober person of 'reasonable firmness' also punishes the weak. The position is not analogous to provocation. The question should not be "did he reasonably fear . . ." but "did he honestly or genuinely fear . . ."

Alan Suckling Q.C. and *Diana Ellis* for the appellant Clarkson. One who incites or procures another to kill or to be a party to a killing cannot be convicted of murder if that other is acquitted by reason of duress. At common law a principal in the second degree to an offence could be guilty of a graver offence than that committed by the principal in the first degree. However, a defendant who was not present either actively or constructively could be guilty of no graver offence than that committed by the principal in the first degree. Thus a person who incited another to kill but was not present at the killing might be guilty of incitement to murder but could not be guilty of murder if for some reason the actual killer was only guilty of manslaughter. The common law rule was not affected by the Accessories and Abettors Act 1861 which only altered the procedure for prosecuting accessories and not the substantive law defining their position and liability. Subject to two exceptions the common law rule remains the law: see *Reg. v. Richards* [1974] Q.B. 776; *Reg. v. Bourne* (1952) 36 Cr.App.R. 125 and *Reg. v. Cogan* [1976] Q.B. 217. The two exceptions are where there is express statutory provision to the contrary: see section 2(4) of the Homicide Act 1957, and where the procurer acts through an innocent agent so that the acts of the agent are deemed to be the acts of the procurer. An innocent agent is one who does not know that what he is doing is wrong. One who kills as a result of duress is not an innocent agent—he knows what he is doing and intends to do it, having made a conscious choice. Since neither exception applies in the present case the common law rule prevails. As an accessory before the fact, Clarkson cannot be guilty of murder, as against incitement to murder, if Burke is to be acquitted by reason of duress.

Benet Hytner Q.C. and *Tim Langdale* for the Crown were invited to address the House on the first certified question only. Duress can never effect a defence to a charge of murder. The *Lynch* case [1975] A.C. 653

was wrongly decided, having been based on an invalid distinction between principles in the first degree and principles in the second degree. It has no basis in policy, morality, principle or authority; and the logic of the majority can be seen to be flawed. Prior to the *Lynch* case writers on criminal law and judicial authority did not recognise duress as a defence to a charge of murder: see the authorities cited in the dissenting judgment of Lord Simon of Glaisdale; reliance is placed on his speech at [1975] A.C. 635, 695D-H. Further, there is no distinction that can be drawn in principle between necessity and duress as defences to a charge of murder. The *Dudley and Stephens* case, 14 Q.B.D. 273, was correctly decided. There are no grounds for distinguishing between principals in the first or second degrees. The contribution of the secondary party to the death may be no less significant than that of the principal. Duress should not afford a defence to a charge of murder whatever the degree of participation. If the *Lynch* case is not wrongly decided, then it is to be regarded as an authority solely on its particular facts or, failing that, as relating solely to principals in the second degree. If duress *is* to afford a defence to a charge of murder, whatever the degree or nature of participation, its effect should only be so as to reduce the charge of murder to one of manslaughter. The *quality* of duress is identical to the *quality* of provocation; both result in a man doing an act of which he is fully conscious, to achieve a result he intends, with his natural inhibitions (which would normally have stopped him from acting as he does) having been removed, in the one case by threats, in the other by provoking words or deeds.

Self Q.C. in reply. It is wrong to suggest that the *Lynch* case was not based on authority: see *Reg. v. Kray (Ronald)* 53 Cr.App.R. 569, 573. Further, a distinction between principals of the first and second degree has already been made by the decisions in the *Lynch* and *Abbott* cases. The *Lynch* case constituted a clear pronouncement of the law; it has been acted on by the courts and Parliament has not seen fit to alter the law. In line with the six principles listed by Lord Morris of Borth-y-Gest in *Reg. v. Knuller (Publishing, Printing and Promotions) Ltd.* [1973] A.C. 435, 466, the House should not on this occasion depart from one of its previous decisions. On the question of duress reducing the charge to one of manslaughter, I rely on the dicta of Lord Morris of Borth-y-Gest in the *Lynch* case [1975] A.C. 653, 670–671, as to there remaining the stigma of conviction.

Their Lordships took time for consideration.

19 February. Lord Hailsham of St. Marylebone L.C. My Lords, these appeals arise from two cases, one originating from a trial in the Manchester Crown Court before Jupp J. and a jury (Howe and Bannister), and one in the Central Criminal Court before the then Common Serjeant, Judge Tudor Price and a jury (Burke and Clarkson).

Howe and Bannister were tried with two other defendants (Murray and Bailey) both of whom during the trial changed their plea to one of guilty and were appropriately sentenced.

A The indictment in the case of Howe, Bannister, Murray and Bailey accused the four men of two murders (Elgar and Pollitt) and a conspiracy to murder (Redfern, an intended victim who escaped in time). The three counts related to three successive days, respectively 10, 11 and 12 October 1983.

Burke and Clarkson were charged with the murder of a single victim (Botton) on 9 July 1983.

B The four current appellants appealed against their convictions to the Court of Appeal (Criminal Division) [1986] Q.B. 626 who dismissed all four appeals in a judgment delivered on 27 January 1986. In giving leave to appeal to your Lordships' House the Court of Appeal (Lord Lane C.J., Russell and Taylor JJ.) certified three questions of law of general public importance as involved in the decision. The three certified C questions are:

> "(1) Is duress available as a defence to a person charged with murder as a principal in the first degree (the actual killer)? (2) Can one who incites or procures by duress another to kill or to be a party to a killing be convicted of murder if that other is acquitted by reason of duress? (3) Does the defence of duress fail if the D prosecution prove that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant?"

The first of these questions involves a reconsideration of the much discussed decisions in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653 and *Abbott v. The Queen* [1977] A.C. E 755.

In answering the second question, the Court of Appeal invited us to reconsider the decision of the Court of Appeal in *Reg. v. Richards* [1974] Q.B. 776, by which it considered itself bound.

In the arguments presented before your Lordships many other reported authorities and citations from established writers, including Law Commission Report, Criminal Law, Report on Defences of General F Application (Law Com. No. 83) printed by order of the House of Commons, dated 27 July 1977, were cited. Reference to other cases will be made as and where appropriate.

I take the facts of these truly horrible cases almost verbatim from the judgment of Lord Lane C.J. [1986] Q.B. 626 in the instant appeal. First, as to the case of Howe and Bannister, Murray and Bailey, the facts G were as follows. At the time of the offences Howe and Bailey were 19, Bannister was 20 and Murray was 35. Howe had one minor conviction for motoring offences. Bannister had convictions for theft and burglary but none for violence. He was on probation. Bailey had convictions for burglary and theft. Murray had 25 previous court appearances, including two convictions for assault occasioning actual bodily harm, and in 1974 he had been convicted of assault with intent to rob and robbery in H respect of which he had been sentenced to eight years' imprisonment.

Bannister met Murray in Risley Remand Centre. Howe and Bailey met in Stockport when Bailey was living in a hostel and Howe happened to be living next door with his grandmother. Murray came to visit Bailey

when he was on six days' home leave from a sentence of two and a half years' imprisonment. Bailey introduced Howe to Murray. Lord Lane C.J. continued, at pp. 635–636:

> "*Count 1: murder of Elgar.* The first victim was a 17-year old youth called Elgar. He was offered a job as a driver by Murray. On the evening of 10 October 1983 all five men were driven by Murray up into the hills between Stockport and Buxton, eventually stopping at some public lavatories at a remote spot called Goytsclough. Murray at some stage told both appellants in effect that Elgar was a 'grass,' and that they were going to kill him. Bannister was threatened with violence if he did not give Elgar 'a bit of a battering.' From thenceforwards Elgar, who was naked, sobbing and begging for mercy, was tortured, compelled to undergo appalling sexual perversions and indignities, he was kicked and punched. Bannister and Howe were doing the kicking and punching. The coup de grace was executed by Bailey who strangled Elgar with a headlock. It is unnecessary to go into further details of the attack on Elgar which are positively nauseating. In brief the two appellants asserted that they had only acted as they did through fear of Murray, believing that they would be treated in the same way as Elgar had been treated if they did not comply with Murray's directions. The prosecution were content to assent to the proposition that death had been caused by Bailey strangling the victim, although the kicks and punches would have resulted in death moments later even in the absence of the strangulation. The body was hidden by the appellants and the other two men. On this basis the appellants were in the position of what would have earlier been principals in the second degree and duress was left to the jury as an issue on this count.
>
> "*Count 2: murder of Pollitt.* Very much the same course of conduct took place as with Elgar. On 11 October 1983 the men picked up Pollitt, a 19-year-old labourer, and took him to the same place where all four men kicked and punched the youth. Murray told Howe and Bannister to kill Pollitt, which they did by strangling him with Bannister's shoe lace. As the appellants were in the position of principals in the first degree, the judge did not leave duress to the jury on this count.
>
> "*Count 3: conspiracy to murder Redfern.* The third intended victim was a 21-year old man. The same procedure was followed, but Redfern suspected that something was afoot and managed with some skill to escape on his motorcycle from what would otherwise have inevitably been another horrible murder. The judge left the defence of duress to the jury on this charge of conspiracy to murder. The grounds of appeal, which are the same in respect of each of these appellants, are as follows. That the judge erred in directing the jury (1) in respect of count 2, that the defence of duress was not available to a principal in the first degree to the actual killing; (2) in respect of counts 1 and 3, that the test as to whether the appellants were acting under duress contains an 'objective' element; that is to say, if the prosecution prove that a

A reasonable man in the position of the defendant would not have felt himself forced to comply with the threats, the defence fails."

So much for the facts relating to the appellants Howe and Bannister.

Lord Lane C.J. then turned to the case of Burke and Clarkson. In the case of Howe and Bannister the defence of duress was left to the jury by Jupp J. on the third count of conspiracy to murder and rejected B by the jury. However, Jupp J. had directed the jury in relation to duress. In this case Burke dressed as a policeman had killed Botton with a sawn off shotgun at the entrance of Botton's house. The Lord Chief Justice continued, at p. 637:

> "The prosecution's case was that Burke had done this at the request of Clarkson, who was anxious to prevent Botton from giving C evidence against him. Clarkson's defence was that he had nothing to do with the shooting at all. Burke's defence was that he had agreed to shoot Botton because of his fear that Clarkson would kill him if he did not, but when it came to the event, the gun went off accidentally and the killing therefore was unintentional and amounted to no more than manslaughter."

D This defence was evidently rejected by the judge as inadmissible, but his defence in respect of manslaughter was left to the jury.

A further submission on behalf of Burke was not argued before us. On the third certified question Jupp J.'s direction to the jury on the nature of duress, although not identical with that of Judge Tudor Price equally raised the question of the objective element in the threats required raised by the third question certified by the Court of Appeal. E The only ground of appeal separately argued before your Lordships on the part of Clarkson depends on the answer to be given to the second certified question to which I will return later.

On the third certified question Mr. Self on behalf of the appellants other than Clarkson addressed to us an impressive argument that the test applied is not objective, i.e. not:

F "whether the threat was of such gravity that it might well have caused a reasonable man placed in the same situation as the defendants to act as the defendant did" nor "would a sober person of reasonable firmness sharing the defendant's characteristics have responded to the threats by taking part in the killing?"

Mr. Self's submission was to the effect that where the defence of G duress is available to an accused, the test of duress does not contain either of these objective elements but is purely subjective to the accused and depends solely on the effect which the actual threat had on the mind of the particular accused.

From the above, it will be seen that each of the appellants other than Clarkson were actual participants, whether as principal in the first or second degree, in the perpetration of the actual killing of the respective H victims in respect of the counts of murder. Clarkson's defence, which was that he had nothing whatever to do with the murder of Botton was rejected by the jury and nothing turns on this at all except that the jury's verdict means that he was the real villain of the piece, since, on

any view of the facts, Burke acted at his suggestion and was very much under his influence. The success of Clarkson's appeal depends solely on the answer to the second certified question, and only arises in the event that Burke's appeal on the first or third question succeeds or succeeds to the extent that a conviction of Burke for manslaughter should be substituted in the case for the verdict of murder. Counsel for Clarkson very properly conceded that the decision of the second question was free from authority binding on this House and open to your Lordships, both on principle and authority, since *Reg. v. Richards* [1974] Q.B. 776, by which the Court of Appeal regarded itself as bound, is not binding on your Lordships' House. It was conceded that, on the facts as they must be assumed to be for the purposes of the second question, apart from authority the point was totally devoid of merit, and, despite the advocacy of counsel, their Lordships did not think fit to trouble counsel for the respondent on this question. The Court of Appeal does not appear to have referred directly (although it was mentioned in argument), to the horrible case of *Reg. v. Cogan* [1976] Q.B. 217, which, if the answer had not been otherwise obvious, seems to me to dispose of the matter. In the event, we also did not call upon the respondent to argue the third certified question since, in my opinion, and, I believe, that of my noble and learned friends, the definition of duress, whether applicable to murder or not, was correctly stated by both trial judges to contain an objective element on the lines of their respective directions and this must involve a threat of such a degree of violence that "a person of reasonable firmness" with the characteristics and in the situation of the defendant could not have been expected to resist. No doubt there are subjective elements as well, but, unless the test is purely subjective to the defendant which, in my view, it is not, the answer to the third certified question, like that to the second, must be "yes."

This leaves us free to discuss the first, and principal, issue in the appeal which is the answer to be given to the first of the three certified questions. In my opinion, this must be decided on principle and authority, and the answer must in the end demand a reconsideration of the two authorities of *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653 and *Abbott v. The Queen* [1977] A.C. 755. Having been myself a party to *Abbott*, I feel I owe it to the two noble and learned friends then with me in the majority to say that we were very conscious of the fact that our decision would only be of persuasive authority in the English jurisdiction whilst the decision in *Lynch*, though a Northern Irish case, which distinguished for the purposes of duress between principals in the first degree on the one hand, and principals in the second degree and aiders and abettors on the other, being a decision of the House of Lords would be likely to be treated as binding throughout England and Wales as well as Northern Ireland. We did, however, say, at p. 763:

> "Whilst their Lordships feel bound to accept the decision of the House of Lords in *Lynch's* case they find themselves constrained to say that had they considered (which they do not) that that decision is an authority which requires the extension of the doctrine to cover cases like the present they would not have accepted it."

Speaking only for myself, it was precisely because the three noble and learned Lords in the majority in *Lynch* had expressly left open the availability of duress as a defence to the actual participant in a murder that I found it possible to accept the decision in *Lynch* without criticism, and then only because the *Abbott* appeal was solely concerned with the question so expressly left open. One only needs to read the facts in *Abbott* to be aware of exactly what the Board was being asked to do if it extended *Lynch* and allowed the appeal.

The present case, in my opinion, affords an ideal and never to be repeated opportunity to consider as we were invited expressly to do by the respondent, the whole question afresh, if necessary, by applying the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 to the decision in *Lynch*.

I therefore consider the matter first from the point of view of authority. On this I can only say that at the time when *Lynch* was decided the balance of weight in an unbroken tradition of authority dating back to Hale and Blackstone seems to have been accepted to have been that duress was not available to a defendant accused of murder. I quote only from Hale and Blackstone. Thus *Hale's Pleas of the Crown* (1736), vol. 1, p. 51:

> "if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent: . . ."

Blackstone, Commentaries on the Laws of England (1857 ed.), vol. 4, p. 28 was to the same effect. He wrote that a man under duress: "ought rather to die himself than escape by the murder of an innocent."

I forbear to quote the eloquent and agonised passage in the dissenting speech of Lord Simon of Glaisdale in *Lynch* [1975] A.C. 653, 695, or the more restrained exposition of Lord Kilbrandon, at p. 702, on the law as expressed in *Reg. v. Dudley and Stephens* (1884) 14 Q.B.D. 273. These quotations are unnecessary since it seems to have been accepted both by the majority in *Lynch* and the minority in *Abbott*, that, to say the least, prior to *Lynch* there was a heavy preponderance of authority against the availability of the defence of duress in cases of murder.

I would only add that article 8 of the Charter of the International Military Tribunal, Treaty Series No. 27 of 1946 at Nuremberg (Cmd. 6903), which was, at the time, universally accepted, save for its reference to mitigation, as an accurate statement of the common law both in England and the United States of America that:

> "The fact that the defendant acted pursuant to the order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires."

"Superior orders" is not identical with "duress," but, in the circumstances of the Nazi regime, the difference must often have been negligible. I

should point out that under article 6, the expression "war crimes" expressly included that of murder; which, of course, does not include the killing of combatants engaged in combat.

What then is said on the other side? I accept, of course, that duress for almost all other crimes had been held to be a complete defence. I need not cite cases. They are carefully reviewed in *Lynch* and establish I believe that the defence is of venerable antiquity and wide extent. I pause only to say that although duress has, in my view, never been defined with adequate precision, two views of its nature can no longer be viewed as correct in the light of reported authority. The first is that of Stephen in his *History of the Criminal Law of England* (1883), vol. 2, p. 108 who first promulgated the opinion that duress was not a defence at all but, as in the Nuremberg statute, only a matter of mitigation. The fact is that, where it is applicable at all, in a long line of cases duress has been treated as a matter of defence entitling an accused to a complete acquittal. But in almost every instance where duress is so treated a cautionary note has been sounded excluding murder in terms sometimes more, and sometimes less emphatic, from the number of crimes where it can be put forward.

The second unacceptable view is that, possibly owing to a misunderstanding which has been read into some judgments, duress as a defence affects only the existence or absence of mens rea. The true view is stated by Lord Kilbrandon (of the minority) in *Lynch* [1975] A.C. 653 and by Lord Edmund-Davies (of the majority) in his analysis, at p. 709.

Lord Kilbrandon said, at p. 703:

> "the decision of the threatened man whose constancy is overborne so that he yields to the threat, is *a calculated decision to do what he knows to be wrong*, and is therefore that of a man with, perhaps to some exceptionally limited extent, a 'guilty mind.' But he is at the same time a man whose mind is less guilty than is his who acts as he does but under no such constraint." [emphasis mine.]

In coming to the same conclusion Lord Edmund-Davies, at pp. 709-710, quoted from Professor Glanville Williams' well known treatise *Criminal Law*, 2nd ed. (1961), p. 751, para. 242:

> "True duress is not inconsistent with act and will as a matter of legal definition, the maxim being coactus volui. Fear of violence does not differ in kind from fear of economic ills, fear of displeasing others, or any other determinant of choice, it would be inconvenient to regard a particular type of motive as negativing of will."

After approving a paragraph from Lowry C.J., Lord Edmund-Davies went on to say that two quotations from Lord Goddard C.J. in the disgusting case of *Reg. v. Bourne* (1952) 36 Cr.App.R. 125 were subject to criticism on this score: see *Lynch* [1975] A.C. 653, 710.

Before I leave the question of reported authority I must refer to two other cases. The first is *Reg. v. Kray (Ronald)* (1969) 53 Cr.App.R. 569 which was, to some extent, relied on by the majority in *Lynch*, on the score of an obiter dictum of Widgery L.J., at p. 578. I do not myself

regard this passage as authoritative. It depends on a concession by the Crown regarding a party who was not before the Court of Appeal as his case had been disposed of at first instance in order to found a submission by the appellants. The dictum is also open to the criticism that Widgery L.J. appeared to treat duress as making a person otherwise than an "independent actor" which is contrary to the analysis which I have accepted above.

The other reported authority is the famous and important case of *Reg. v. Dudley and Stephens* (1884) 14 Q.B.D. 273. That is generally and, in my view correctly, regarded as an authority on the availability of the supposed defence of necessity rather than duress. But I must say frankly that, if we were to allow this appeal, we should, I think, also have to say that *Dudley and Stephens* was bad law. There is, of course, an obvious distinction between duress and necessity as potential defences; duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is, in my view a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other.

I shall revert to *Dudley and Stephens* when I come to consider some of the issues of principle involved in our response to the first certified question. But at this stage I feel that I should say that in *Abbott* I would have been prepared to accept a distinction between *Abbott* [1977] A.C. 755 and *Lynch* [1975] A.C. 653 on the basis of the argument which appeared to attract Lord Morris of Borth-y-Gest at pp. 671-672 of *Lynch*. I would not myself have immersed myself in the somewhat arcane terminology of accessory, principal in the second degree, and aiding and abetting. But it did seem to me then, and it seems to me now, that there is a valid distinction to be drawn in ordinary language between a man who actually participates in the irrevocable act of murder to save his own skin or that of his nearest and dearest and a man who simply participates before or after the event in the necessary preparation for it or the escape of the actual offender. It is as well to remember that, in *Abbott* the facts were that Abbott had dug a pit, thrown the victim into it, subjected her in co-operation with others to murderous blows and stab wounds and then buried her alive. It seems to me that those academics who see no difference between that case and the comparatively modest part alleged (falsely as is now known) in *Lynch* to have been played by the defendant under duress have parted company with a full sense of reality. Nevertheless and in spite of this, and in the face of the somewhat intemperate criticism to which this type of distinction has sometimes been subjected since *Abbott* I am somewhat relieved to know that the views of my noble and learned friends on the main issue permit me to escape from such niceties and simply to say that I do not think that the decision in *Lynch* can be justified on authority and that, exercising to the extent necessary, the freedom given to us by the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 which counsel for the respondent urged us to apply, I consider that the right

course in the instant appeal is to restore the law to the condition in which it was almost universally thought to be prior to *Lynch*. It may well be that that law was to a certain extent unclear and to some extent gave rise to anomaly. But these anomalies I believe to be due to a number of factors extraneous to the present appeal and to the intrinsic nature of duress. The first is the mandatory nature of the sentence in murder. The second resides in the fact that murder being a "result" crime, only being complete if the victim dies within the traditional period of a year and a day and that, in consequence, a different crime may be charged according to whether or not the victim actually succumbs during the prescribed period. The third lies in the fact (fully discussed amongst many other authorities in *Reg. v. Hyam* [1975] A.C. 55) that, as matters stand, the mens rea in murder consists not simply in an intention to kill, but may include an intent to commit grievous bodily harm. It has always been possible for Parliament to clear up this branch of the law (or indeed to define more closely the nature and extent of the availability of duress as a defence). But Parliament has conspiciously, and perhaps deliberately, declined to do so. In the meantime, I must say that the attempt made in *Lynch* to clear up this situation by judicial legislation has proved to be an excessive and perhaps improvident use of the undoubted power of the courts to create new law by creating precedents in individual cases.

This brings me back to the question of principle. I begin by affirming that, while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure, and, in the present case, the overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.

No one, who has read *Dudley and Stephens* whether in the Law Reports, or in the more popular and discursive volume published by Professor Simpson *Cannibalism in the Common Law* (1984), can fail to be moved by the poignant and anguished situation to which the two shipwrecked mariners with Brooks (who was not guilty) and the innocent boy of 17, who was the victim, were exposed and which led the Home Secretary of the day to commute a death sentence for murder to one of six months' imprisonment. Nevertheless, when one comes to examine the case as one of legal principle it is, I believe, the case that the conclusion reached by the judges of the Queen's Bench Division and voiced by Lord Coleridge C.J., not without manifest compassion, has met with very wide acceptance. I quote from 14 Q.B.D. 273, 286–288:

> "Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called 'necessity.' But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from

morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead*; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. . . . It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The anwer must be No. . . ."

It was pointed out in a footnote in this case at p. 288 (attributed to Grove J.) that if the principle were once admitted and the castaways not rescued, in the meantime it would have been lawful for the strongest of the four men to eat his way through the whole crew of the drifting boat, in order to be rescued himself.

I must dissent profoundly from the statement of my predecessor Bacon, a greater moralist perhaps in theory than in practice, where, quoted by Lord Coleridge C.J. in *Dudley and Stephens*, in his commentary on the maxim "necessitas inducit privilegium quoad jura privata" he writes, at p. 285:

> "'if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither se defendendo nor by misadventure, but justifiable.'"

I also dissociate myself from the view of Rumpff J.A. in the South African case *S. v. Goliath*, 1972 (3) S.A. 1, 465, 480 (based, however, on Roman Dutch law) and quoted in *Abbott* [1977] A.C. 755, 771 as a justification for the opinion of the dissenting minority:

> "'It is generally accepted . . . that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person. I do not think that such an

exception to the general rule which applies in criminal law, is justified.'"

In general, I must say that I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest, as did the majority in *Lynch* and the minority in *Abbott* that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation, as they did in *Dudley and Stephens*. But many will not, and I do not believe that as a "concession to human frailty" the former should be exempt from liability to criminal sanctions if they do. I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either "just or humane" which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and the poltroon in the name of a "concession to human frailty."

I must not, however, underestimate the force of the arguments on the other side, advanced as they have been with such force and such persuasiveness by some of the most eminent legal minds, judicial and academic, in the country.

First, amongst these is, perhaps, the argument from logic and consistency. A long line of cases, it is said, carefully researched and closely analysed, establish duress as an available defence in a wide range of crimes, some at least, like wounding with intent to commit grievous bodily harm, carrying the heaviest penalties commensurate with their gravity. To cap this, it is pointed out that at least in theory, a defendant accused of this crime under section 18 of the Offences against the Person Act 1861, but acquitted on the grounds of duress, will still be liable to a charge of murder if the victim dies within the traditional period of one year and a day. I am not, perhaps, persuaded of this last point as much as I should. It is not simply an anomaly based on the defence of duress. It is a product of the peculiar mens rea allowed on a charge of murder which is not confined to an intent to kill. More persuasive, perhaps, is the point based on the availability of the defence of duress on a charge of attempted murder, where the actual intent to kill is an essential prerequisite. It may be that we must meet this casus omissus in your Lordships' House when we come to it. It may require reconsideration of the availability of the defence in that case too.

I would, however, prefer to meet the case of alleged inconsistency head on. Consistency and logic, though inherently desirable, are not always prime characteristics of a penal code based like the common law on custom and precedent. Law so based is not an exact science. All the same, I feel I am required to give some answer to the question posed. If duress is available as a defence to some crimes of the most grave why, it may legitimately be asked, stop at murder, whether as accessory or principal and whether in the second or the first degree? But surely I am entitled, as in the view of the Common Serjeant in the instant case of Clarkson and Burke, to believe that some degree of proportionality

between the threat and the offence must, at least to some extent, be a prerequisite of the defence under existing law. Few would resist threats to the life of a loved one if the alternative were driving across the red lights or in excess of 70 m.p.h. on the motorway. But, to use the Common Serjeant's analogy, it would take rather more than the threat of a slap on the wrist or even moderate pain or injury to discharge the evidential burden even in the case of a fairly serious assault. In such a case the "concession to human frailty" is no more than to say that in such circumstances a reasonable man of average courage is entitled to embrace as a matter of choice the alternative which a reasonable man could regard as the lesser of two evils. Other considerations necessarily arise where the choice is between the threat of death or a fortiori of serious injury and deliberately taking an innocent life. In such a case a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead he is embracing the cognate but morally disreputable principle that the end justifies the means.

I am not so shocked as some of the judicial opinions have been at the need, if this be the conclusion, to invoke the availability of administrative as distinct from purely judicial remedies for the hardships which might otherwise occur in the most agonising cases. Even in *Dudley and Stephens* in 1884 when the death penalty was mandatory and frequently inflicted, the prerogative was used to reduce a sentence of death by hanging to one of six months in prison. In murder cases the available mechanisms are today both more flexible and more sophisticated. The trial judge may make no minimum recommendation. He will always report to the Home Secretary, as he did in the present case of Clarkson and Burke. The Parole Board will always consider a case of this kind with a High Court judge brought into consultation. In the background is always the prerogative and, it may not unreasonably be suggested, that is exactly what the prerogative is for. If the law seems to bear harshly in its operation in the case of a mandatory sentence on any particular offender there has never been a period of time when there were more effective means of mitigating its effect than at the present day. It may well be thought that the loss of a clear right to a defence justifying or excusing the deliberate taking of an innocent life in order to emphasise to all the sanctity of a human life is not an excessive price to pay in the light of these mechanisms. Murder, as every practitioner of the law knows, though often described as one of the utmost heinousness, is not in fact necessarily so, but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical and repeated offences like the so called Moors murders to the almost venial, if objectively immoral, "mercy killing" of a beloved partner.

Far less convincing than the argument based on consistency is the belief which appears in some of the judgments that the law must "move with the times" in order to keep pace with the immense political and social changes since what are alleged to have been the bad old days of Blackstone and Hale. I have already dealt with this argument in my respectful criticism of the dissent in *Reg. v. Hyam* [1975] A.C. 55. The

argument is based on the false assumption that violence to innocent victims is now less prevalent than in the days of Hale or Blackstone. But I doubt whether this is so. We live in the age of the holocaust of the Jews, of international terrorism on the scale of massacre, of the explosion of aircraft in mid air, and murder sometimes at least as obscene as anything experienced in Blackstone's day. Indeed one of the present appeals may provide an example. I have already mentioned the so-called Moors murders. But within weeks of hearing this appeal a man was convicted at the Central Criminal Court* of sending his pregnant mistress on board an international aircraft at Heathrow, with her suitcase packed with a bomb and with the deliberate intention of sending the 250 occupants, crew, passengers, mistress and all to a horrible death in mid air. I cannot forbear to say that if *Abbott* [1977] A.C. 755 was wrongly decided, and had the attempt succeeded, the miscreant who did this would have been free to escape scot free had he been in a position to discharge the evidential burden on duress and had the prosecution, on the normal *Woolmington* principles *(Woolmington v. Director of Public Prosecutions* [1935] A.C. 462, 482), been unable to exclude beyond reasonable doubt the possibility of his uncorroborated word being true. I must also point out in this context that known terrorists are more and not less vulnerable to threats than the ordinary man and that a plea of duress in such a case may be all the more plausible on that account. To say this is not to cast doubt on the reliability and steadfastness of juries. Counsel for the appellants was able to say with perfect truth that, where duress in fact has been put forward in cases where it was available, juries have been commendably robust as they were in the instant cases in rejecting it where appropriate. The question is not one of the reliability of juries. It is one of principle. Should the offence of duress be available in principle in such a case as that of *Reg. v. Hindawi** where, of course, it was not put forward? The point which I am at the moment concerned to make is that it is not clear to me that the observations of Blackstone and Hale, and almost every respectable authority, academic or judicial, prior to *Lynch* are necessarily to be regarded in this present age as obsolescent or inhumane or unjust owing to some supposed improvement in the respect for innocent human life since their time which unfortunately I am too blind to be able for myself to perceive. Still less am I able to see that a law which denies such a defence in such a case must be condemned as lacking in justice or humanity rather than as respectable in its concern for the sanctity of innocent lives. I must add that, at least in my view, if *Abbott* were wrongly decided some hundreds who suffered the death penalty at Nuremberg for murders were surely the victims of judicial murder at the hands of their conquerors owing to the operation of article 8. Social change is not always for the better and it ill becomes those of us who have participated in the cruel events of the 20th century to condemn as out of date those who wrote in defence of innocent lives in the 18th century.

A B C D E F G H

* *Reg. v. Hindawi*: see "The Times," 25 October 1986, p. 4.

During the course of argument it was suggested that there was available to the House some sort of half way house between allowing these appeals and dismissing them. The argument ran that we might treat duress in murder as analogous to provocation, or perhaps diminished responsibility, and say that, in indictments for murder, duress might reduce the crime to one of manslaughter. I find myself quite unable to accept this. The cases show that duress, if available and made out, entitles the accused to a clean acquittal, without, it has been said, the "stigma" of a conviction. Whatever other merits it may have, at least the suggestion makes nonsense of any pretence of logic or consistency in the criminal law. It is also contrary to principle. Unlike the doctrine of provocation, which is based on emotional loss of control, the defence of duress, as I have already shown, is put forward as a "concession to human frailty" whereby a conscious decision, it may be coolly undertaken, to sacrifice an innocent human life is made as an evil lesser than a wrong which might otherwise be suffered by the accused or his loved ones at the hands of a wrong doer. The defence of diminished responsibility (which might well, had it then been available to *Dudley and Stephens*, have prevailed there) is statutory in England though customary in Scotland, the law of its origin. But in England at least it has a conceptual basis defined in the Homicide Act 1957 which is totally distinct from that of duress if duress be properly analysed and understood. Provocation (unique to murder and not extending even to "section 18" offences) is a concession to human frailty due to the extent that even a reasonable man may, under sufficient provocation temporarily lose his self control towards the person who has provoked him enough. Duress, as I have already pointed out, is a concession to human frailty in that it allows a reasonable man to make a conscious choice between the reality of the immediate threat and what he may reasonably regard as the lesser of two evils. Diminished responsibility as defined in the Homicide Act 1957 depends on abnormality of mind impairing mental responsibility. It may overlap duress or even necessity. But it is not what we are discussing in the instant appeal.

I must add that, had I taken a different view, in the cases of Bannister and Howe and, for rather different reasons, in the case of Burke, I would have gone on to consider the questions whether in any of these appeals the appellants had discharged the evidential burden in duress, or whether, if they had, on the facts described in the judgment of Lord Lane C.J., the proviso should not have been applied in every case. The case of Clarkson is surely beyond dispute on the assumption that the second certified question is not answered in his favour. But whatever may be the characteristics of duress, even on the existing law the ingredients of immediacy and absence of voluntary association: see *Reg. v. Fitzpatrick* [1977] N.I. 20, must be essential components of the evidential burden more or less on the lines of the draft bill annexed to the Law Commission Report No. 83, to which I have referred above. Even apart from this and on the assumption that the matter should properly have been left to the jury, I am rather more than doubtful whether any properly instructed jury could have acquitted on the murder charges in either of the instant cases or on the facts of *Abbott*. It is not

necessary to express a concluded opinion on this since, for the reasons I have adumbrated above, I consider that these appeals should be dismissed and the certified questions answered respectively (1) no, (2) yes, (3) yes. If so, the questions relating to the proviso and evidential burden do not arise. So far as I have indicated, the decision of this House in *Lynch* [1975] A.C. 653 should be regarded as unsatisfactory and the law left as it was before *Lynch* came up for decision. The decision in *Abbott* [1977] A.C. 755 should be followed, and, unless it can be distinguished on the facts, that in *Reg. v. Richards* [1974] Q.B. 776 should be overruled.

Lord Bridge of Harwich. My Lords, the defence of duress, as a general defence available at common law which is sufficient to negative the criminal liability of a defendant against whom every ingredient of an offence has otherwise been proved, is difficult to rationalise or explain by reference to any coherent principle of jurisprudence. The theory that the party acting under duress is so far deprived of volition as to lack the necessary criminal intent has been clearly shown to be fallacious: *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653, 709-711, *per* Lord Edmund-Davies. No alternative theory seems to provide a wholly satisfactory foundation on which the defence can rest. The law, therefore, might have developed more logically had it adopted the view of Stephen, expressed in his *History of the Criminal Law of England* (1883) vol. 2, p. 108, that duress should be a matter, not of defence, but of mitigation. If this course had been followed, it might sensibly have led to the further development that, in the case of murder, duress, like provocation, would have sufficed to reduce the offence from murder to manslaughter. But that is not the law and, though it is open to Parliament to decide that it ought to be, that course is not open to us. We have to accept the law as we find it and, given the lack of any clear underlying principle to which we can refer, we must not, I think, be wholly surprised if the solution to the problem posed by the first certified question arising in these appeals fails to remove all the anomalies which some may discern in this field of the law.

If we take the majority decisions of this House in *Lynch* and of the Privy Council in *Abbott v. The Queen* [1977] A.C. 755, as establishing the present law, duress is a complete defence to a murderer otherwise guilty as a principal in the second degree, it is no defence to a murderer guilty as a principal in the first degree. Technically, of course, the two decisions were made in two distinct jurisdictions, though three Lords of Appeal (Lord Wilberforce, Lord Kilbrandon and Lord Edmund-Davies) were party to both. In this situation it is an odd quirk of the system operated by two ultimate appellate tribunals, each deciding by a majority, that their two decisions should have the combined effect of affirming a distinction which four out of the seven participants in the decisions (Lord Simon of Glaisdale and Lord Kilbrandon in *Lynch*, Lord Wilberforce and Lord Edmund-Davies in *Abbott*) expressly rejected as untenable. The only speech which gives any positive, even if somewhat lukewarm, support to the distinction is that of Lord Morris of Borth-y-Gest in *Lynch*. He said, at p. 671:

A "The issue in the present case is therefore whether there is any reason why the defence of duress, which in respect of a variety of offences has been recognised as a possible defence, may not also be a possible defence on a charge of being a principal in the second degree to murder. I would confine my decision to that issue. It may be that the law must deny such a defence to an actual killer, and that the law will not be irrational if it does so."

B

Later, referring to the "actual killer," he said: "There, I think, before allowing duress as a defence it may be that the law will have to call a halt." Lord Morris supported the distinction by illustrations of theoretical cases where principals in the second degree (as in the case of *Lynch* itself) might be seen as playing a relatively minor role in a murderous C enterprise. These passages are naturally referred to in the majority judgment in *Abbott* [1977] A.C. 755 but this hardly strengthens support for the distinction when one remembers, first, that Lord Kilbrandon was one of the majority, secondly, that the essential attitude of the majority in *Abbott* to the decision in *Lynch* is expressed by saying, at p. 764, that: "their Lordships, whilst loyally accepting the decision in *Lynch's* case, are certainly not prepared to extend it."

D As is pointed out in *Smith & Hogan, Criminal Law*, 5th ed. (1983), p. 211 there is no necessary correspondence between degrees of culpability of parties to a murder and the technical distinction between principals in the first and second degrees, which would make the latter a rational cut-off point at which the defence of duress ceases to be available. My noble and learned friend, Lord Griffiths, gives cogent E examples to illustrate this. I can find nothing whatever to be said for leaving the law as it presently stands. Ineluctably, as it seems to me, we must either move forward and affirm the view of the minority in *Abbott* that duress is available as a defence to murder generally, or depart from *Lynch* and restore the law as it was generally accepted before *Lynch*, whereby duress was not a defence available to any party otherwise guilty of murder.

F All other considerations apart, I should myself have found a sufficient reason for deciding in favour of the latter course in the consideration that it was never open to the House in its judicial capacity to make such a fundamental reform of the law as the introduction of duress as a defence to murder involved. The passages in *Lynch* [1975] A.C. 653 in the speeches to this effect of Lord Simon of Glaisdale, at pp. 695-696, G and of Lord Kilbrandon, at pp. 699-701, seem to me to carry conviction. But that conviction is now immensely strengthened by the knowledge that Parliament, even against the background of the plainly unsatisfactory present state of the law, has in ten years taken no action on the Report of the Law Commission, No. 83. If duress is now to be made available generally as a defence to murder, it seems to me incontrovertible that the proper means to effect such a reform is by legislation such as that H proposed by the Law Commission. Not only is it for Parliament to decide whether the proposed reform of the law is socially appropriate, but it is also by legislation alone, as opposed to judicial development, that the scope of the defence of duress can be defined with the degree of

precision which, if it is to be available in murder at all, must surely be of critical importance.

My Lords, I have had the advantage of reading in advance the speeches of my noble and learned friends, Lord Griffiths and Lord Mackay of Clashfern. I entirely agree with them and gratefully adopt their fuller reasoning, in addition to my own short observations, as leading to the conclusion that the appeals should be dismissed and the first certified question answered in the negative. I would wish to emphasise in particular my concurrence with Lord Griffiths in the weight he attaches to the opinion of Lord Lane C.J. as expressed in the judgment of the Court of Appeal (Criminal Division) appealed against.

For the reasons given in the speeches of my noble and learned friends, the Lord Chancellor and Lord Mackay of Clashfern, I would answer the second and third certified questions in the affirmative.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Mackay of Clashfern. I agree with it, and for the reasons which he gives I would dismiss the appeal.

I cannot pretend, however, that I regard the outcome as satisfactory. It is not logical, and I do not think it can be just, that duress should afford a complete defence to charges of all crimes less grave than murder, but not even a partial defence to a charge of that crime. I say nothing as to treason, for that is not here in issue. I am persuaded, nevertheless, to agree with my noble and learned friend by three considerations. First, it seems to me that, so far as the defence of duress is concerned, no valid distinction can be drawn between the commission of murder by one who is a principal in the first degree and one who is a principal in the second degree. Secondly, I am satisfied that the common law of England has developed over several centuries in such a way as to produce the illogical, and as I think unjust, situation to which I have referred. Thirdly, I am convinced that, if there is to be any alteration in the law on such an important and controversial subject, that alteration should be made by legislation and not by judicial decision.

Lord Griffiths. My Lords, as a general rule I support the view that in criminal appeals to this House it is desirable wherever possible to have one speech, so that the judges and practitioners may turn to one source for authoritative guidance. Clarity, certainty and, wherever possible, simplicity are invaluable attributes of the criminal law which must be understood by laymen and especially by jurymen as well as lawyers. This will usually be better achieved by the distillation of the consensus view of the House in one speech rather than leaving judges of first instance to pick their way through five speeches in an attempt to apply the principle of the decision to the trial currently taking place before them. There are, however, exceptions to every rule and as I believe that we should now depart from the decision of this House in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653, I feel that I should shortly state the reasons for my opinion.

A For centuries it was accepted that English criminal law did not allow duress as a defence to murder. It was so stated in *Hale's Pleas of the Crown* (1736), vol. 1, p. 51, repeated by Blackstone in his *Commentaries on the Laws of England*, 1857 ed., vol. 4, p. 28, and so taught by all the authoritative writers on criminal law. It was accepted by those responsible for drafting the criminal codes for many parts of the British Empire and they provided, in those codes, that duress should not be a defence to B murder. In *Reg. v. Tyler and Price* (1838) 8 C. & P. 616, Denman C.J. told the jury in emphatic language that they should not accept a plea of duress that was put up in defence to a charge of murder against those who were not the actual killers. Fifty years later, in *Reg. v. Dudley and Stephens* (1884) 14 Q.B.D. 273, the defence of necessity was denied to the men who had killed the cabin boy and eaten him in order that they C might survive albeit only Stephens was the actual killer. The reasoning that underlies that decision is the same as that which denies duress as a defence to murder. It is based upon the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life.

There are surprisingly few reported decisions on duress but it can not be gainsaid that the defence has been extended, particularly since the D second war, to a number of crimes. I think myself it would have been better had this development not taken place and that duress had been regarded as a factor to be taken into account in mitigation as Stephen suggested in his *History of the Criminal Law of England* (1883) vol. 2, p. 108. However, as Lord Morris of Borth-y-Gest said in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653, 670, E it is too late to adopt that view. And the question now is whether that development should be carried a step further and applied to a murderer who is the actual killer, and if the answer to this question is no, whether there is any basis upon which it can be right to draw a distinction between a murderer who did the actual killing and a murderer who played a different part in the design to bring about the death of the victim.

F The first suggestion that the defence of duress might be available to a person guilty of murder appears to have emerged in *Reg. v. Kray (Ronald)* (1969) 53 Cr.App.R. 569, 576-578 in the judgment of the Court of Appeal delivered by Widgery L.J.

It is instructive to see the circumstances in which it arose:

> "We now consider the effect on these two applicants (the Kray G brothers) of the defence put forward by Anthony Barry. The case against Anthony Barry was that he was an accessory before the fact to the McVitie murder, and the Crown relied primarily on his having carried a gun from the Regency Club to Evering Road, knowing Reginald Kray intended to use it in the murder of McVitie. Barry admitted from the outset that he had done this, but pleaded that he had acted under duress being in fear for the safety of H himself and his family if he failed to carry out the order of the Krays. In support of this defence Barry gave evidence of an immediate threat made in relation to his unwillingness to carry the gun and also to prior conduct of the Kray twins which, he said, had

placed him in terror of them. The immediate threat was said to have been a message transmitted from Reginald Kray by Hart to the effect that, if Barry would not take the gun to Evering Road, the Krays would come back to the Regency Club; a message which Barry interpreted as meaning that he would get hurt as well as McVitie. The general background of terror was supported by evidence of previous threats and acts of violence committed by the Krays or their henchmen at the Regency Club and similar acts which had been reported to Barry, but which he had not seen. Barry's counsel indicated the general nature of his defence at an early stage in the trial, and counsel for the other accused were naturally apprehensive lest this should let in a great deal of otherwise inadmissible evidence detrimental to the Krays. An attempt was made at the outset to get a ruling as to the admissibility of this evidence, but the judge had no information on which to rule and wisely declined. Barry's counsel attempted to cross-examine along these lines when the Crown witnesses to the Cornell murder were giving evidence, but he made little progress in the face of objections. Later, however, a substantial body of evidence of the vicious and violent reputation of the Kray twins was let in either during cross-examination of Crown witnesses or in Barry's own evidence and that of his witnesses.

"Mr. Platts-Mills contended before us that the whole of this evidence was inadmissible since Barry had never laid an adequate foundation for the defence of duress. He concedes that although duress is not available in murder to a person charged as a principal it is available to an accessory, but he submits the accessory must show he had no alternative and in this case Barry had the alternative of taking the gun to the police instead of Evering Road. Accordingly, says Mr. Platts-Mills, Barry never had a viable defence of duress and the judge should have discharged the jury as soon as this became apparent. Mr. Wrightson takes a broader view and accepts that Barry had a valid defence if his will was so overcome by threats and fear that he had no independent choice and ceased to be an independent actor. He accepts that it was open to Barry to support this defence by evidence of threats and violent conduct within his own knowledge, and also by recounting incidents of which he had heard and the news of which had affected his mind. Mr. Wrightson's complaint is that the evidence admitted went beyond these limits and related to events early in 1966 which were not proved to have come to Barry's notice. He further complains that on occasions a witness called to prove that Barry had been told of a particular incident went on to testify to the truth of that information, which Mr. Wrightson submits was irrelevant and inadmissible since it did not go to the state of Barry's mind. It is evident to us that both the judge and counsel for the Crown did their best to confine this evidence to the limits contended for by Mr. Wrightson, but this was not always possible. Having examined all such incidents to which our attention has been drawn, we are satisfied that they give rise to no miscarriage of justice and do not render the verdict unsafe or

A unsatisfactory. We are further satisfied that Barry had a viable defence on the basis left to the jury by the judge, namely, that by reason of threats he was so terrified that he ceased to be an independent actor, and that the evidence of violent conduct by the Krays which Barry put before the court was accordingly relevant and admissible."

B Like the Lord Chancellor, I regard this decision as of little authority. The decision proceeded on a concession by counsel that the defence of duress was available to an accessory before the fact to murder and I have myself doubts about the correctness of allowing the defence at all if, as it appears, Anthony Barry had got himself into this predicament by reason of his association with known violent criminals: see *Reg. v. Fitzpatrick* [1977] N.I. 20. It is, however, understandable that the judge C would not wish to limit the full extent of the gangleader's villainy being laid before the jury.

Widgery L.J. who had given the judgment in *Reg. v. Kray (Ronald)*, 53 Cr.App.R. 569, repeated the same qualification in *Reg. v. Hudson* [1971] 2 Q.B. 202, 206 when allowing the defence in a case of perjury he said: "it is clearly established that duress provides a defence in all D offences including perjury (except possibly treason or murder as a principal)," but apart from saying that the court had been referred to much authority he gave no reason for limiting the exception to murder as a *principal*.

In *Director of Public Prosecution for Northern Ireland v. Lynch* [1975] A.C. 653, of the majority who held that duress should be available to an aider and abettor to a murder, in that case the driver of E the getaway car, Lord Morris of Borth-y-Gest said of the actual killer, at p. 671:

> "the person is told that to save his life he himself must personally there and then take an innocent life. It is for him to pull the trigger or otherwise personally to do the act of killing. There, I think, before allowing duress as a defence it may be that the law will have F to call a halt."

Lord Wilberforce said, at p. 685: "I would leave cases of direct killing by a principal in the first degree to be dealt with as they arise." Lord Edmund-Davies, at p. 715, foreshadowed his opinion in *Abbott v. The Queen* [1977] A.C. 755, by citing a passage from *Smith and Hogan Criminal Law*, 3rd ed. (1973), p. 166:

G > "The difficulty about adopting a distinction between the principal and secondary parties as a rule of law is that the contribution of the secondary party to the death may be no less significant than that of the principal."

To illustrate this one only has to point to the case of a "contract" killing.

H Thus it seems to me, my Lords, that even after *Lynch* the whole weight of authority denied the defence of duress to the actual killer. This view had the unanimous support of the Supreme Court of South Australia in *Reg. v. Brown and Morely* [1968] S.A.S.R. 467, when the

majority denied the defence of duress to an aider and abettor to murder and Bray C.J., who dissented on this issue, nevertheless said, at p. 499: "I repeat also that as at present advised I do not think duress could constitute a defence to one who actually kills or attempts to kill the victim."

In *Abbott v. The Queen* [1977] A.C. 755, the majority in the Privy Council applied the law of duress in accordance with English authority and denied it as a defence to a murderer who took part in the actual killing. The minority would have extended the defence even to the actual killer, pointing out the illogicality of allowing it to the principal in the second degree or the aider and abettor and denying it to the principal in the first degree.

Since that time the whole question of duress has been studied by the Law Commission: see Law Commission Report, Criminal Law, Report on Defences of General Application (Law Com. No. 83), dated 27 July 1977. The report sets out the arguments for and against the defence and deals in particular with whether it should apply to murder. They balanced the argument based upon the sanctity of human life that denies the defence to a murderer against the argument urged by the majority in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653, that the law should not demand more than human frailty can sustain. They preferred the latter argument and accordingly recommended that a defence of duress should be available to all crimes including murder. But in the draft Bill they annexed to their report, Appendix 1, Criminal Liability (Duress) Bill, p. 56 they prescribed the defence in far narrower terms than it had hitherto been defined by the judges and they introduced conditions which clearly go beyond the bounds of judicial creativity and would require legislation. It is worth reminding oneself of the first two clauses:

> "1. (1) The following provisions of this section provide a defence (referred to below in this Act as 'the defence of duress') in place of the defence of duress at common law (which is consequently abolished except in relation to offences committed before the passing of this Act). (2) Subject to section 2 and subsection (5) below, a person shall not be guilty of an offence by virtue of any action taken by him under duress. (3) A person shall be regarded for the purposes of this section as having taken any action under duress if he was induced to take it by any threat of harm to himself or another and at the time when he took it he believed (whether or not on reasonable grounds)—(*a*) that the harm threatened was death or serious personal injury (physical or mental); (*b*) that the threat would be carried out immediately if he did not take the action in question or, if not immediately, before he could have any real opportunity of seeking official protection; and (*c*) that there was no other way of avoiding or preventing the harm threatened; provided, however, that in all the circumstances of the case (including what he believed with respect to the matters mentioned in paragraphs (*a*) to (*c*) above and any of his personal circumstances which are relevant) he could not reasonably have been expected to resist the threat. (4) The fact that any official

protection which might have been available in the circumstances would or might not have been effective to prevent the harm threatened is immaterial for the purposes of subsection (3)(*b*) above. (5) The defence of duress does not apply in any case where on the occasion in question the defendant was voluntarily and without reasonable cause in a situation in which he knew he would or might be called upon to commit the offence with which he is charged or any offence of the same or a similar character under threat of death or serious personal injury (whether to himself or to anyone else) if in the event he should refuse to do so. (6) In this section 'official protection' means the protection of the police, of the authorities governing any prison or other custodial institution, or of any other similar authority concerned in the maintenance of law and order. (7) The fact that one party to any action is exempt by virtue of this section from criminal liability for that action shall not affect the question whether anyone else is guilty of an offence by virtue of being a party to that action.

"2. (1) On a trial on indictment the defendant shall not, without leave of the court, be entitled to rely on the defence of duress unless he has served on the prosecutor at least seven clear days before the hearing a notice in writing—(*a*) indicating his intention to rely on the defence; (*b*) giving particulars of the words or conduct constituting the threat which induced him to take the action in question; and (*c*) giving any information then in his possession to identify or assist in identifying any persons making the threat and any persons other than himself on whom the harm threatened would have been inflicted if the threat had been carried out. (2) In any proceedings for an offence it shall be for the prosecution to prove that the defence of duress does not apply, but only if there is sufficient evidence to raise an issue with respect to whether or not it does."

I cannot refrain from commenting that if duress is introduced as a merciful concession to human frailty it seems hard to deny it to a man who knows full well that any official protection he may seek will not be effective to save him from the threat of death under which he has acted, but such is the effect of clauses 1(3)(*b*) and 1(4) when read together.

But what, I think, is significant is the fact that although the report clearly recognised that English law did not extend the defence of duress to the actual killer and recommended that the law should be changed, Parliament never acted upon this advice. The report was laid before Parliament by Lord Elwyn-Jones L.C. in July 1977 but no steps have been taken to introduce a Bill upon the lines they recommended. This must at least be some indication that the community at large are not pressing for a change in the law to remedy a perceived injustice.

Against this background are there any present circumstances that should impel your Lordships to alter the law that has stood for so long and to extend the defence of duress to the actual killer? My Lords, I can think of none. It appears to me that all present indications point in the opposite direction. We face a rising tide of violence and terrorism

against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it. The sanctity of human life lies at the root of this ideal and I would do nothing to undermine it, be it ever so slight.

On this question your Lordships should, I believe, accord great weight to the opinion of the Lord Chief Justice who by virtue of his office and duties is in far closer touch with the practical application of the criminal law and better able to evaluate the consequence of a change in the law than those of us who sit in this House. This is what Lord Lane C.J. had to say in his judgment in this case [1986] Q.B. 626, 641:

> "It is true that to allow the defence to the aider and abettor but not to the killer may lead to illogicality, as was pointed out by this court in *Reg. v. Graham (Paul)* [1982] 1 W.L.R. 294, where the question in issue in the instant case was not argued, but that is not to say that any illogicality should be cured by making duress available to the actual killer rather by removing it from the aider and abettor. Assuming that a change in the law is desirable or necessary, we may perhaps be permitted to express a view. The whole matter was dealt with in extenso by Lord Salmon in his speech in *Abbott v. The Queen* [1977] A.C. 755 to which reference has already been made. He dealt there with the authorities. It is unnecessary for us in the circumstances to repeat the citations which he there makes. It would, moreover, be impertinent for us to try to restate in different terms the contents of that speech with which we respectfully agree. Either the law should be left as it is or the defence of duress should be denied to anyone charged with murder, whether as a principal in the first degree or otherwise. It seems to us that it would be a highly dangerous relaxation in the law to allow a person who has deliberately killed, maybe a number of innocent people, to escape conviction and punishment altogether because of a fear that his own life or those of his family might be in danger if he did not; particularly so when the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt, the facts of necessity being as a rule known only to the defendant himself. That is not to say that duress may not be taken into account in other ways, for example by the parole board. Even if, contrary to our views, it were otherwise desirable to extend the defence of duress to the actual killer, this is surely not the moment to make any such change, when acts of terrorism are commonplace and opportunities for mass murder have never been more readily to hand."

My Lords, in my view we should accept the advice of Lord Lane C.J. and the judges who sat with him, and decline to extend the defence to the actual killer. If the defence is not available to the killer what justification can there be for extending it to others who have played their part in the murder. I can, of course, see that as a matter of commonsense one participant in a murder may be considered less morally at fault than another. The youth who hero-worships the gangleader and acts as lookout man whilst the gang enter a jeweller's

shop and kill the owner in order to steal is an obvious example. In the eyes of the law they are all guilty of murder, but justice will be served by requiring those who did the killing to serve a longer period in prison before being released on licence than the youth who acted as lookout. However, it is not difficult to give examples where more moral fault may be thought to attach to a participant in murder who was not the actual killer; I have already mentioned the example of a contract killing, when the murder would never have taken place if a contract had not been placed to take the life of the victim. Another example would be an intelligent man goading a weakminded individual into a killing he would not otherwise commit.

It is therefore neither rational nor fair to make the defence dependent upon whether the accused is the actual killer or took some other part in the murder. I have toyed with the idea that it might be possible to leave it to the discretion of the trial judge to decide whether the defence should be available to one who was not the killer, but I have rejected this as introducing too great a degree of uncertainty into the availability of the defence. I am not troubled by some of the extreme examples cited in favour of allowing the defence to those who are not the killer such as a woman motorist being highjacked and forced to act as getaway driver, or a pedestrian being forced to give misleading information to the police to protect robbery and murder in a shop. The short, practical answer is that it is inconceivable that such persons would be prosecuted; they would be called as the principal witnesses for the prosecution.

As I can find no fair and certain basis upon which to differentiate between participants to a murder and as I am firmly convinced that the law should not be extended to the killer, I would depart from the decision of this House in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653 and declare the law to be that duress is not available as a defence to a charge of murder, or to attempted murder. I add attempted murder because it is to be remembered that the prosecution have to prove an even more evil intent to convict of attempted murder than in actual murder. Attempted murder requires proof of an intent to kill, whereas in murder it is sufficient to prove an intent to cause really serious injury.

It cannot be right to allow the defence to one who may be more intent upon taking a life than the murderer. This leaves, of course, the anomaly that duress is available for the offence of wounding with intent but not to murder if the victim dies subsequently. But this flows from the special regard that the law has for human life, it may not be logical but it is real and has to be accepted.

I do not think that your Lordships should adopt the compromise solution of declaring that duress reduces murder to manslaughter. Where the defence of duress is available it is a complete excuse. This solution would put the law back to lines upon which Stephen suggested it should develop by regarding duress as a form of mitigation. English law has rejected this solution and it would be yet another anomaly to introduce it for the crime of murder alone. I would have been more tempted to go down this road if the death penalty had remained for murder. But the sentence for murder although mandatory and expressed as imprisonment

for life, is in fact an indefinite sentence, which is kept constantly under review by the parole board and the Home Secretary with the assistance of the Lord Chief Justice and the trial judge. I have confidence that through this machinery the respective culpability of those involved in a murder case can be fairly weighed and reflected in the time they are required to serve in custody.

I have had the advantage of reading the speeches of the Lord Chancellor and Lord Mackay of Clashfern and I agree with the opinions they have expressed on the second and third questions raised before your Lordships.

Lord Mackay of Clashfern. My Lords, at the request of all parties to the appeals by Burke, Howe and Bannister, they were conjoined and have been heard together. They arise out of two separate cases and the issues in each are similar. The appeal of Clarkson arises out of one of these cases and by agreement of the parties to it and the other appeals it has also been heard with the others.

The material facts in Burke's case are, that on 9 July 1983 Burke shot dead one Henry Botton at point blank range with a sawn off shotgun. The victim was due to give evidence at Inner London Crown Court on 18 July 1983 in a trial in which Burke's co-defendant, William Clarkson, was accused with others of conspiracy to handle stolen goods. The victim was to have given evidence in support of the defence of duress by Clarkson, which was raised by one of Clarkson's co-defendants. Burke's defence at his trial was that he had agreed to shoot the victim only because of his fear that Clarkson would kill him if he did not, but when it came to the event, the gun actually went off accidentally and the killing was therefore unintentional and amounted to no more than manslaughter. At the trial it was submitted on behalf of Burke that he was entitled to be acquitted completely of murder and manslaughter by reason of duress and that if this submission failed he was entitled to be acquitted of murder and found guilty of manslaughter by reason of accident in an unlawful act. The judge who presided at the trial, the then Common Sergeant, Judge Tudor Price, directed the jury that Burke, as the actual killer, was not entitled to rely upon the defence of duress to the charge of murder but since he considered there was evidence in support of the defence of duress he left it to the jury in respect of manslaughter. He further directed the jury that they could not convict Clarkson of murder unless they convicted Burke of murder and that if Burke was guilty of manslaughter then Clarkson could be convicted, at most, only of manslaughter and that if the appellant was acquitted on the grounds of duress then Clarkson, the author of the duress, must be convicted of manslaughter.

Howe and Bannister were indicted together with two other men, Murray and Bailey, at Manchester Crown Court on two counts of murder and one of conspiracy to murder contrary to section 1 of the Criminal Law Act 1977. The particulars of the first count referred to the murder of Mitchell Elgar on 10 October 1983, the particulars of the second count referred to the murder of Martin Pollitt on 11 October

1983 and the conspiracy to murder related to a conspiracy on 12 October 1983 to murder John Redfern.

In October 1983 Howe and Bailey were aged 19, Bannister was aged 20 and Murray was 35. Howe had one conviction for a motoring offence. Bannister had convictions for dishonesty offences but none for violence. Murray had 25 previous court appearances including appearances for offences of violence and in 1974 was sentenced to a term of eight years' imprisonment for offences of assault with intent to rob and robbery. Bannister met Murray whilst at Risley Remand Centre. Howe was introduced to Murray by Bailey and all became acquainted with each other for a period of four days prior to the first murder and were in each other's company almost all the time from the period 6 October to 13 October. Murray was the dominant figure. He was dishonest, powerful, violent and sadistic. Through acts of actual violence or threats of violence, Murray gained control of each of the appellants who became fearful of him. Mitchell Elgar, referred to in count 1, was killed at a remote spot in the Goyt valley, Derbyshire. His death was preceded by a savage kicking and beating, and acts of torture and sexual perversion perpetrated by Bannister, Howe and Bailey. The coup de grace was executed by Bailey who strangled Mitchell Elgar with a headlock. Before the attack, Murray had told Howe and Bannister that Elgar was a 'grass' and was to be killed and Bannister was threatened with violence by Murray if he did not give Mitchell Elgar "a bit of a battering." Martin Pollitt referred to in count 2 was picked up by the four men, to whom I have referred, on 11 October 1983 and they took him to the same place as that in which Mitchell Elgar was killed on the previous day. Murray told Howe and Bannister to kill Pollitt, which they did by strangling him with Bannister's shoelace, each holding one end. In relation to count 3, the same procedure had been followed. However Redfern, the intended victim, suspected something was afoot and managed to escape from what otherwise would have inevitably been his death. Howe and Bannister each admitted to being parties to the killings and the conspiracy to kill in the circumstances I have described but they alleged that they acted in fear of their own lives because of the conduct of Murray. They alleged that they feared that Murray would treat them in the same way as Mitchell Elgar had been treated if they did not comply with his directions.

At the trial, counsel for the prosecution were content to assent to the proposition that in respect of the murder of Mitchell Elgar death had been caused by Bailey strangling the victim although the kicks and punches would have resulted in death moments later even in the absence of strangulation. On that basis, the prosecution were content that the judge who presided at the trial should leave the defence of duress to the jury in respect of count 1 and also in respect of count 3. On count 2, the judge rejected the submissions made on behalf of both appellants that the defence of duress should be allowed.

In directing the jury to consider the plea of duress in respect of counts 1 and 3, the judge directed the jury that the test to be applied was whether "the threat was of such gravity that it might well have caused a reasonable man placed in the same situation as the defendants

to act as the defendants did" and to pose the question "would a sober person of reasonable firmness sharing the defendants' characteristics have responded to the threats by taking part in the killing."

Burke was convicted of murder and Howe and Bannister were convicted on both counts of murder with which they were charged and also on the count of conspiracy to murder. All appealed to the Court of Appeal (Criminal Division) [1986] Q.B. 626 where the appeals were heard together and dismissed. In dismissing the appeals the court certified three points of law of general public importance were involved in the decisions to dismiss the appeals, namely:

> "(1) Is duress available as a defence to a person charged with murder as a principal in the first degree (the actual killer)? (2) Can the one who incites or procures by duress another to kill or to be a party to a killing be convicted of murder if that other is acquitted by reason of duress? (3) Does the defence of duress fail if the prosecution prove that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant?"

The Court of Appeal granted leave to appeal against their decision to this House. Clarkson's appeal was also heard by the Court of Appeal (Criminal Division) at the same time as the others and was also dismissed and leave to appeal to this House was granted. Although he is concerned in the first question already mentioned as a basis for his concern in the second, which arises only if Burke is successful on the first, Clarkson's appeal is concerned with the second question in respect of which he contends that if Burke was acquitted by reason of duress he could not be convicted of murder as one who had incited or procured by duress Burke to kill or to be a party to a killing.

It will be convenient to deal with the matters arising in these appeals by reference to the three questions of law which have been certified and the order in which the questions are posed by the Court of Appeal.

Question 1

The question whether duress is available as a defence in law to a person charged with murder as a principal in the first degree (actual killer) has not been the subject of a previous decision of this House. The matter received consideration in this House in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653.

Lynch had driven a motor car containing a group of the I.R.A. in Northern Ireland on an expedition in which they shot and killed a police officer. He was tried along with two other men on a count that he murdered the police constable and was convicted and sentenced to life imprisonment. This House, by a majority of three to two, allowed Lynch's appeal and ordered a new trial pursuant to section 13 of the Criminal Appeal (Northern Ireland) Act 1968. At the new trial Lynch was allowed to plead the defence of duress but this defence was rejected by the jury and Lynch was again convicted.

It was accepted by the majority of the House in the *Lynch* case that at that time the balance of such judicial authority as existed was against

the admission of the defence of duress in cases of first degree murder. The writers were generally agreed in saying that the defence was not available in murder although later writers appear to have said so following Hale. The references are *Hale's Pleas of the Crown* (1736), vol. 1, pp. 51, 434; *East's Pleas of the Crown* (1803), vol. 1, p. 294; *Blackstone, Commentaries on the Laws of England*, (1809 ed.), vol. 4, p. 30; *Glanville Williams, Criminal Law*, 2nd ed. (1961), p. 759, para. 247; *Russell on Crime*, 12th ed. (1964), vol. 1, pp. 90–91; *Smith and Hogan Criminal Law*, 3rd ed. (1973), pp. 166–167. Since the fundamental passage is that from *Hale* at p. 51, I think it is appropriate to quote it in full:

> "If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death does not excuse him, if he commit the fact; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept de securitate pacis. Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent: but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant; for by the violence of the assault, and the offence commited upon him by the assailant himself, the law of nature and necessity, hath made him his own protector cum debito moderamine inculpatae tutelae, as shall be farther shewed, when we come to the chapter of homicide se defendendo."

Counsel for the appellants, Burke, Bannister and Howe, in his very detailed and careful submission accepted this position as reflecting the law up to the time of the *Lynch* case. Since that time, on this question there has been the decision of the Privy Council in *Abbott v. The Queen* [1977] A.C. 755, a majority decision in which the minority consisted of Lord Wilberforce and Lord Edmund-Davies who, along with Lord Morris of Borth-y-Gest, had constituted the majority in the *Lynch* case. Counsel for these appellants submitted that your Lordships should hold that the reasoning of the majority in the *Lynch* case should be applied and extended to cover the present cases. He recognised that this would involve a change in the law on this matter but argued that the change was one which your Lordships should properly decide to make as the consequence of the decision of the House in *Lynch*.

In approaching this matter, I look for guidance to Lord Reid's approach to the question of this House making a change in the prevailing view of the law in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001, 1021–1022, where he said:

> "I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to

extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. And if we do in effect change the law, we ought in my opinon only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted."

In the present appeal, as I have said, the reason advanced on behalf of the appellants to allow the defence of duress to persons in the appellants' position as the actual killers is based upon the assertion that this House in *Lynch* allowed it to a person who was charged with murder as a principal in the second degree otherwise described as an aider and abettor and that there was no relevant distinction between that case and the case of the actual killer. He submitted that the reasoning of the majority in the *Lynch* case when logically applied to the circumstances of the present case led to the result that the defence of duress should have been admitted here and that the appeal should accordingly be allowed.

Counsel for the Crown submitted that the appeal should be refused, that the existing law did not allow the defence of duress to an actual killer or principal in the first degree and that if no proper distinction could be made between this case and the *Lynch* case the House should decline to follow *Lynch* because in his submission the reasoning in *Lynch* was flawed.

The first question accordingly that arises in this appeal is whether any distinction can be made between this case and the *Lynch* case [1975] A.C. 653. It is clear from the speech of Lord Morris of Borth-y-Gest that he did not regard it as a necessary consequence of his view that the defence of duress should be available to a principal in the first degree. He says, at p. 671:

"The issue in the present case is therefore whether there is any reason why the defence of duress, which in respect of a variety of offences has been recognised as a possible defence, may not also be a possible defence on a charge of being a principal in the second degree to murder. I would confine my decision to that issue. It may be that the law must deny such a defence to an actual killer, and

A that the law will not be irrational if it does so. Though it is not possible for the law always to be worked out on coldly logical lines there may be manifest factual differences and contrasts between the situation of an aider and abettor to a killing and that of the actual killer."

He goes on to distinguish the case of a person in the position of an B aider and abettor who saves his own life at a time when the loss of another life is not a certainty with the position of a person who is told that to save his life he must himself personally there and then take an innocent life. There, says Lord Morris of Borth-y-Gest, at pp. 671-672:

"I think, before allowing duress as a defence it may be that the law will have to call a halt. May there still be force in what long ago C was said by Hale? 'Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent.' (see *Hale's Pleas of the Crown*, vol. 1, p. 51). Those words have over long periods of time influenced both thought D and writing but I think that their application may have been unduly extended when it is assumed that they were intended to cover all cases of accessories and aiders and abettors."

Lord Wilberforce said, at p. 685:

"I would decide that the defence is in law admissible in a case of E aiding and abetting murder, and so in the present case. I would leave cases of direct killing by a principal in the first degree to be dealt with as they arise."

Lord Edmund-Davies, referring to the opinion of Bray C.J. in *Reg. v. Brown and Morley* [1968] S.A.S.R. 467, said, at p. 715:

"His conclusion, at p. 499, was that '. . . the trend of the later F cases, general reasoning, and the express authority of the Privy Council in [*Sephakela v. The Queen* [1954] H.C.T.L.R. 60] prevent the acceptance of the simple proposition that no type of duress can ever afford a defence to any type of complicity in murder. I repeat also that as at present advised I do not think duress could constitute a defence to one who actually kills or attempts to kill the victim.' It G appears to me, with respect, that the reliance placed by Bray C.J. on *Sephakela's* case is misplaced, though I concur when he says, at p. 496, that 'there is nothing, in my view, in *Sephakela's* case to prevent us from holding that there can be circumstances in which duress can be a defence to a person charged with murder as a principal in the second degree.' Such was the role of Lynch, and this House is accordingly not now called upon to deal with the H reservation of the Chief Justice in relation to a person who under duress 'actually kills or attempts to kill the victim.' As to the actual killer, while I naturally seek to refrain from prejudging future cases, I think it right to say that I agree with the observation of *Smith and*

Hogan, Criminal Law, 3rd ed., p. 166 that, 'The difficulty about adopting a distinction between the principal and secondary parties as a rule of law is that the contribution of the secondary party to the death may be no less significant than that of the principal.' "

In my opinion, it is plain from these quotations that the majority of this House in *Lynch*, and particularly Lord Morris of Borth-y-Gest, were reaching a decision without committing themselves to the view that the reasoning which they had used would apply to an actual killer. To take one example, it would have been impossible to cite Bray C.J. in support of the proposition that the defence of duress should be allowed in a charge of murder unless this distinction had been taken.

While therefore *Lynch* was decided by reasoning which does not extend to the present case, the question remains whether there is a potential distinction between this case and that of *Lynch* by which to determine whether or not the defence of duress should be available. I consider that *Smith & Hogan* were perfectly right in the passage cited from that work by Lord Edmund-Davies to which I have already referred. I have not been able to find any writer of authority that is able to give rational support for the view that the distinction between principals in the first degree and those in the second degree is relevant to determine whether or not duress should be available in a particular case of murder. Whatever may have divided Lord Wilberforce and Lord Edmund-Davies on the one hand, from Lord Simon of Glaisdale and Lord Kilbrandon on the other, it is apparent that all agree that this is not a distinction which should receive practical effect in the law.

I believe that the discussions of this matter have shown that at one extreme, namely that of the person who actually kills by a deliberate assault on a person who is then present, there is a fair body of support for the view that the defence of duress should either not be allowed or that the practical result will be, even if it is allowed, that it will never be established, while there is also strong support for the view that at the other extreme minor participation which the law regards as sufficient to impute criminal guilt should be capable of being excused by the defence of duress. A similar consideration was no doubt present to the mind of Hume, the eminent writer on the Scottish criminal law, where in his work *Commentaries on the Law of Scotland respecting Crimes* (1829) in relation to the defence in Scotland known as coercion, after a reference to the case of James Graham who claimed that he had been forced by Rob Roy and his gang to take part in an armed robbery, he said, at p. 53:

"But generally, and with relation to the ordinary condition of a well-regulated society, where every man is under the shield of the law, and has the means of resorting to that protection, this is at least somewhat a difficult plea, and can hardly be serviceable in the case of a trial for any atrocious crime, unless it have the support of these qualifications: an immediate danger of death or great bodily harm; an inability to resist the violence; *a backward and an inferior part in the perpetration*; and a disclosure of the fact, as well as

A restitution of the spoil, on the first safe and convenient occasion." (emphasis added).

So far, I have not found any satisfactory formulation of a distinction which would be sufficiently precise to be given practical effect in law and at the same time differentiate between levels of culpability so as to produce a satisfactory demarcation between those accused of murder, B who should be entitled to resort to the defence of duress and those who were not.

The House is therefore, in my opinion, faced with the unenviable decision of either departing altogether from the doctrine that duress is not available in murder or of departing from the decision of this House in *Lynch*. While a variety of minor attacks on the reasoning of the C majority were mounted by counsel for the Crown in the present case, I do not find any of these sufficiently important to merit departing from *Lynch* on these grounds. I do, however, consider that having regard to the balance of authority on the question of duress as a defence to murder prior to *Lynch*, for this House now to allow the defence of duress generally in response to a charge of murder would be to effect an important and substantial change in the law. In my opinion too, it would D involve a departure from the decision in the famous case of *Reg. v. Dudley and Stephens* (1884) 14 Q.B.D. 273. The justification for allowing a defence of duress to a charge of murder is that a defendant should be excused who killed as the only way of avoiding death himself or preventing the death of some close relation such as his own well-loved child. This essentially was the dilemma which Dudley and Stephens faced and in denying their defence the court refused to allow this E consideration to be used in a defence to murder. If that refusal was right in the case of Dudley and Stephens it cannot be wrong in the present appeals. Although the result of recognising the defence advanced in that case would be that no crime was committed and in the case with which we are concerned that a murder was committed and a particular individual was not guilty of it (subject to the consideration of the second F certified question) that does not distinguish the two cases from the point of view now being considered.

To change the law in the manner suggested by counsel for the appellants in the present case would, in my opinion, introduce uncertainty over a field of considerable importance.

So far I have referred to the defence of duress as if it were a precisely defined concept but it is apparent from the decisions that it is G not so and I cannot do better in this connection than refer to what Lord Simon of Glaisdale said on this point in *Lynch* [1975] A.C. 653, 686:

> "Before turning to examine these considerations, it is convenient to have a working definition of duress—even though it is actually an extremely vague and elusive juristic concept. I take it for present purposes to denote such [well grounded] fear, produced by threats, H of death or grievous bodily harm [or unjustified imprisonment] if a certain act is not done, as overbears the actor's wish not to perform the act, and is effective, at the time of the act, in constraining him to perform it. I am quite uncertain whether the words which I have

put in square brackets should be included in any such definition. It is arguable that the test should be purely subjective, and that it is contrary to principle to require the fear to be a reasonable one. Moreover, I have assumed, on the basis of *Reg. v. Hudson* [1971] 2 Q.B. 202 that threat of future injury may suffice, although *Stephen's Digest of the Criminal Law* art. 10 is to the contrary. Then the law leaves it also quite uncertain whether the fear induced by threats must be of death or grievous bodily harm, or whether threatened loss of liberty suffices: cases of duress in the law of contract suggest that duress may extend to fear of unjustified imprisonment; but the criminal law returns no clear answer. It also leaves entirely unanswered whether, to constitute such a general criminal defence, the threat must be of harm to the person required to perform the act, or extends to the immediate family of the actor (and how immediate?), or to any person. Such questions are not academic, in these days when hostages are so frequently seized."

To say that a defence in respect of which so many questions remain unsettled should be introduced in respect of the whole field of murder is not to promote certainty in the law. In this connection it is worth observing that when in the Law Commission Report, Criminal Law, Report on Defences of General Application (Law Com. No. 83) the Law Commission recommended that the defence of duress should be available in murder they suggested a definition of duress which is, I believe, considerably narrower than that generally thought to be available in the present law in respect of other offences. In particular they required that the defendant must believe that "the threat will be carried out immediately, or if not immediately, before he can have any real opportunity of seeking official protection" and they suggested that the fact that any official protection which might have been available in the circumstances would or might not have been effective to prevent the harm threatened should be immaterial in this context. It is of interest and importance to notice that this point figured long before in Hale's statement which I have quoted. It is to be noted that it was of this very part of Hale's statement that Lord Wilberforce said in *Lynch* [1975] A.C. 653, 682: "Even if this argument was ever realistic, he would surely have recognised that reconsideration of it must be required in troubled times." I notice that in the Law Commission Report, Criminal Law, Codification of the Criminal Law (Law Com. No. 143), dated 28 March 1985, which contains a report to the Law Commission in respect of the codification of the criminal law by a team from the Society of Public Teachers of Law, doubt is expressed on the soundness of this recommendation in Report No. 83. This particular matter does not arise in the circumstances of the present case, but the great difficulty that has been found in obtaining a consensus of informed opinion upon it is just one illustration of the uncertain nature of what would be introduced into this most important area of the criminal law if the defence of duress were to be available.

Since the decision in *Lynch* the Law Commission have published in their Report No. 83, to which I have referred, the result of an extensive

survey of the law relating to duress and have made recommendations upon it which have been laid before Parliament. In my opinion, the problems which have been evident in relation to the law of murder and the availability of particular defences is not susceptible of what Lord Reid described as a solution by a policy of make do and mend. While I appreciate fully the gradual development that has taken place in the law relating to the defence of duress I question whether the law has reached a sufficiently precise definition of that defence to make it right for us sitting in our judicial capacity to introduce it as a defence for an actual killer for the first time in the law of England. Parliament, in its legislative capacity, although recommended to do so by the report of the Law Commission, has not taken any steps to make the defence of duress available generally to a charge of murder even where it has the power to define with precision the circumstances in which such a defence would be available.

It has also been suggested for consideration whether, if the defence of duress is to be allowed in relation to murder by the actual killer, the defence should have the effect, if sustained, of reducing the crime to that of manslaughter by analogy with the defence of provocation. Provocation itself was introduced into the law by judicial decision in recognition of human frailty, although it is now the subject of a statutory provision and it was suggested that the same approach might be taken now with regard to duress. In this connection it is worthy of note that in the judgment in *S. v. Goliath*, 1972 (3) S.A. 1, 465 in which Rumpff J.A. examined the question of whether compulsion could constitute the defence on a charge of murder from which Lord Wilberforce [1975] A.C. 653, 683, quoted as a statement of principle a substantial passage, Rumpff J.A. went on in a later passage to say, at pp. 480–481:

> "Whether an acquittal will follow on a charge of murder because of compulsion, will depend on the particular circumstances of each case and the whole factual complex will have to be carefully investigated and judged with the greatest circumspection. In the simple case where A kills B just to save his own life, the strength of the compulsion would be a decisive factor and the compulsion would have to be so strong that although not vis absoluta, it would still be comparable with it, in the sense that the reasonable man in the particular circumstances would not be able to withstand it. For the purposes of replying to the reserved questions it is unnecessary to determine in what light the defence of compulsion must be seen i.e. whether it operates because of the lawfulness of the compelled act or whether it excludes the full fault."

And a little later he said, at p. 482:

> "I am of the opinion that the second question which was stated, ['that is "whether the special defence of compulsion can ever in law constitute a complete defence to a charge of murder so as to entitle an accused to an acquittal?" '] must be answered by a qualified 'yes,' in the sense that a complete defence will depend on the circumstances of each case."

From this I take it that Rumpff J.A. was of opinion that the defence might, depending on the circumstances, either lead to an acquittal or to a reduction of the charge from murder to a lower category of unlawful killing.

In my opinion, we would not be justified in the present state of the law in introducing for the first time into our law the concept of duress acting to reduce the charge to one of manslaughter even if there were grounds on which it might be right to do so. On that aspect of the matter the Law Commission took the view that where the defence of duress had been made out it would be unjust to stigmatise the person accused with a conviction and there is clearly much force in that view.

The argument for the appellants essentially is that *Lynch* having been decided as it was and there being no practical distinction available between *Lynch* and the present case this case should be decided in the same way. The opposite point of view is that since *Lynch* was concerned not with the actual killer but with a person who was made guilty of his act by the doctrine of accession the correct starting point for this matter is the case of the actual killer. In my opinion, this latter is the correct approach. The law has extended the liability to trial and punishment faced by the actual killer to those who are participants with him in the crime and it seems to me, therefore, that where a question as important as this is in issue the correct starting point is the case of the actual killer. It seems to me plain that the reason that it was for so long stated by writers of authority that the defence of duress was not available in a charge of murder was because of the supreme importance that the law afforded to the protection of human life and that it seemed repugnant that the law should recognise in any individual in any circumstances, however extreme, the right to choose that one innocent person should be killed rather than another. In my opinion, that is the question which we still must face. Is it right that the law should confer this right in any circumstances, however extreme? While I recognise fully the force of the reasoning which persuaded the majority of this House in *Lynch* to reach the decision to which they came in relation to a person not the actual killer, it does not address directly this question in relation to the actual killer. I am not persuaded that there is good reason to alter the answer which Hale gave to this question. No development of the law or progress in legal thinking which have taken place since his day have, to my mind, demonstrated a reason to change this fundamental answer. In the circumstances which I have narrated of a report to Parliament from the Law Commission concerned inter alia with this very question it would seem particularly inappropriate to make such a change now. For these reasons, in my opinion, the first certified question should be answered in the negative.

It follows that, in my opinion, the House should decline to follow the decision in *Lynch*. In my opinion, the reasoning which persuaded this House in *Reg. v. Shivpuri* [1987] A.C. 1 that it was appropriate to reconsider its earlier decision in *Anderton v. Ryan* [1985] A.C. 560 applies equally to the present case, although the decision in *Lynch* is of longer standing than was that of *Anderton v. Ryan*. Up to the present time, the courts have been declining to allow an actual killer to plead

the defence of duress while allowing it to a person charged with murder who was not the actual killer as is illustrated in the circumstances of these appeals. Lord Lane C.J. in *Reg. v. Graham (Paul)* [1982] 1 W.L.R. 294, 297 illustrated how technical and puzzling in practice the distinction could be. In my opinion, it would not be right to allow this state of affairs to continue. I recognise that this decision leaves certain apparent anomalies in the law but I regard these as consequences of the fact that murder is a result related crime with a mandatory penalty. Consequently no distinction is made in penalty between the various levels of culpability. Differentiation in treatment once sentence has been pronounced depends upon action by the Crown advised by the executive government although that may be affected by a recommendation which the court is empowered to make. Where a person has taken a minor part in a wounding with intent and is dealt with on that basis he may receive a very short sentence. If sufficiently soon after that conviction the victim dies, on the same facts with the addition of the victim's death caused by the wounding he may be sentenced to life imprisonment. This is simply one illustration of the fact that very different results may follow from a set of facts together with the death of a victim from what would follow the same facts if the victim lived.

Question 2

I turn now to the second certified question. In the view that I take on question one the second does not properly arise. However, I am of opinion that the Court of Appeal reached the correct conclusion upon it as a matter of principle.

Giving the judgment of the Court of Appeal Lord Lane C.J. said [1986] Q.B. 626, 641–642:

> "The judge based himself on a decision of this court in *Reg. v. Richards* [1974] Q.B. 776. The facts in that case were that Mrs. Richards paid two men to inflict injuries on her husband which she intended should 'put him in hospital for a month.' The two men wounded the husband but not seriously. They were acquitted of wounding with intent but convicted of unlawful wounding. Mrs. Richards herself was convicted of wounding with intent, the jury plainly, and not surprisingly, believing that she had the necessary intent, though the two men had not. She appealed against her conviction on the ground that she could not properly be convicted as accessory before the fact to a crime more serious than that committed by the principals in the first degree. The appeal was allowed and the conviction for unlawful wounding was substituted. The court followed a passage from *Hawkins' Pleas of the Crown*, vol. 2. c. 29, para. 15: 'I take it to be an uncontroverted rule that [the offence of the accessory can never rise higher than that of the principal]; it seeming incongruous and absurd that he who is punished only as a partaker of the guilt of another, should be adjudged guilty of a higher crime than the other.'
>
> "James L.J. delivering the judgment in *Reg. v. Richards* [1974] Q.B. 776 said, at p. 780: 'If there is only one offence committed, and that is the offence of unlawful wounding, then the person who

has requested that offence to be committed, or advised that that offence be committed, cannot be guilty of a graver offence than that in fact which was committed.' The decision in *Reg. v. Richards* has been the subject of some criticism—see for example *Smith & Hogan, Criminal Law*, 5th ed. (1983), p. 140. Counsel before us posed the situation where A hands a gun to D informing him that it is loaded with blank ammunition only and telling him to go and scare X by discharging it. The ammunition is in fact live, as A knows, and X is killed. D is convicted only of manslaughter, as he might be on those facts. It would seem absurd that A should thereby escape conviction for murder. We take the view that *Reg. v. Richards* [1974] Q.B. 776 was incorrectly decided, but it seems to us that it cannot properly be distinguished from the instant case."

I consider that the reasoning of Lord Lane C.J. is entirely correct and I would affirm his view that where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not, in my opinion in any way, result in a compulsory reduction for the other participant.

Question 3

I turn now to question three. On this question the Lord Lane C.J. said [1986] Q.B. 626, 642–643:

"Finally we turn to the second ground of appeal in the case of Howe and Bannister, namely, that the judge was wrong in directing the jury that there is an 'objective' element in the defence of duress. The judge directed the jury on this point as follows: 'The test is whether the threat was of such gravity that it might well have caused a reasonable man placed in the same situation as the defendant to act as the defendant did.' And a little later on the judge put it in this way: 'Would a sober person of reasonable firmness sharing the defendant's characteristics have responded to the threats by taking part in the killing . . . ?' It seems to us that this direction was in accordance with the judgment of this court in *Reg. v. Graham (Paul)* [1982] 1 W.L.R. 294. Consequently this ground of appeal likewise fails."

In *Reg. v. Graham (Paul)*, Lord Lane C.J. giving the judgment of the Court of Appeal (Criminal Division) said, at p. 300:

"As a matter of public policy, it seems to us essential to limit the defence of duress by means of an objective criterion formulated in the terms of reasonableness. Consistency of approach in defences to criminal liability is obviously desirable. Provocation and duress are analogous. In provocation the words or actions of one person break the self-control of another. In duress the words or actions of one person break the will of another. The law requires a defendant to have the self-control reasonably to be expected of the ordinary citizen in his situation. It should likewise require him to have the steadfastness reasonably to be expected of the ordinary citizen in his

A situation. So too with self-defence, in which the law permits the use of no more force than is reasonable in the circumstances. And, in general, if a mistake is to excuse what would otherwise be criminal, the mistake must be a reasonable one. It follows that we accept Mr. Sherrard's submission that the direction in this case was too favourable to the appellant. The Crown having conceded that the issue of duress was open to the appellant and was raised on the B evidence, the correct approach on the facts of this case would have been as follows. (1) Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believed King had said or done, he had good cause to fear that if he did not so act King would kill him or (if this is to be added) cause him serious physical injury? (2) If so, have the prosecution made C the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed King said or did by taking part in the killing? The fact that a defendant's will to resist has been eroded by the voluntary consumption of drink or drugs or both is not relevant to this test."

D In my opinion, what Lord Lane C.J. said in the present case and in *Graham* was entirely correct. In my opinion, this question also falls to be answered "yes."

I, therefore, consider that these appeals should be dismissed, the first certified question answered in the negative and the second and third in the affirmative.

E *Appeals dismissed. First certified question answered in the negative, second and third answered in the affirmative.*

Solicitors: Hogan Harris & Co.; Mackesys; Director of Public F *Prosecutions.*

C. T. B.

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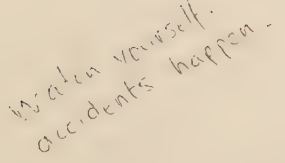

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[HOUSE OF LORDS]

SPILIADA MARITIME CORPORATION . . . APPELLANTS

AND

CANSULEX LTD. . . . . RESPONDENTS

B

1986 July 7, 8, 9;
Nov. 19

Lord Keith of Kinkel, Lord Templeman, Lord Griffiths, Lord Mackay of Clashfern, and Lord Goff of Chieveley

Practice—Writ—Application to set aside—Shipowners bringing action in England alleging damage to vessel caused by shipping wet sulphur cargo—Shippers carrying on business in British Columbia—Whether case suitable for service out of jurisdiction—Relevance of claim being time barred in British Columbia—R.S.C., Ord. 11, r. 4(2)

C

Ships' Names—Spiliada

In 1980 a Liberian owned vessel was chartered to carry a cargo of bulk sulphur from Vancouver, British Columbia, to Indian ports. The shipowners alleged that the cargo was wet when loaded and as a result caused severe corrosion to the vessel. They obtained leave ex parte to serve proceedings on the shippers in Vancouver or elsewhere in Canada on the ground that it was an action to recover damages for breach of a contract governed by English law. The shippers issued a summons under R.S.C., Ord. 12, r. 8, asking that the ex parte order be discharged on the ground, inter alia, that the case had not been shown to be "a proper one for service out of the jurisdiction" under R.S.C., Ord. 11, r. 4(2).[1] At the hearing of the application Staughton J., who had already started to hear the trial of a similar action for damages involving the same shippers in respect of another ship, the *Cambridgeshire*, considered, inter alia, the availability of witnesses, potential multiplicity of proceedings and the fact that the accumulated experience of counsel and solicitors derived from their participation in the *Cambridgeshire* action would lead to savings of time and money. He dismissed the application.

D

E

F

On the shippers' appeal, the Court of Appeal held that it was impossible to conclude that the factors considered by the judge, when taken together, showed that the English court was distinctly more suitable for the ends of justice, and that a further factor, not considered by Staughton J., that if the present proceedings were set aside the shipowners would be faced with a defence of limitation in British Columbia, was a neutral factor. The Court of Appeal allowed the appeal and set aside the writ.

G

On appeal by the shipowners:—

Held, allowing the appeal, that in order to determine whether a case was a proper one for service out of the jurisdiction under R.S.C., Ord. 11, r. 4(2) the court had, as in applications for a stay of proceedings founded on the ground of forum non

H

[1] R.S.C., Ord. 11, r. 4(2): "No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order."

conveniens where the action was as of right by service on a defendant within the jurisdiction, to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice; that, accordingly, the judge having identified the correct test and considered the relevant factors, including the advantages of efficiency, expedition and economy in bringing the action in England following the *Cambridgeshire* action, the Court of Appeal had had no grounds for interfering with the exercise of his discretion (post, pp. 464F, G, 465G—466A, 480F–G, 484E–F, 485F—486B).

Dictum of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665 applied.

Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107, C.A. approved.

MacShannon v. Rockware Glass Ltd. [1978] A.C. 795, H.L.(E.) considered.

Dicta of Lord Diplock and Lord Wilberforce in *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1984] A.C. 50, 65, 72, H.L.(E.) and of Stephenson L.J. in *Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria)* [1981] 2 Lloyd's Rep. 119, 129, C.A. explained.

Per curiam. Had the point arisen, the shipowners had not acted unreasonably in failing to commence proceedings in British Columbia before the expiry of the limitation period there. Had the judge erred in the exercise of his discretion, the proceedings would only have been set aside on condition that the shippers waived their right to rely on the time bar in British Columbia (post, pp. 464F, 465G—466A, 487G—488A).

Per Lord Templeman. The solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge, before whom submissions should be measured in hours not days. An appeal should be rare and the appellate court should be slow to interfere (post, p. 465E–G).

Decision of the Court of Appeal [1985] 2 Lloyd's Rep. 116 reversed.

The following cases are referred to in the opinion of Lord Goff of Chieveley:

Abidin Daver, The [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470; [1984] 1 Lloyd's Rep. 339, H.L.(E.)

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50; [1983] 3 W.L.R. 241; [1983] 2 All E.R. 884, H.L.(E.)

Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119, C.A.

Atlantic Star, The [1973] Q.B. 364; [1972] 3 W.L.R. 746; [1972] 3 All E.R. 705, C.A.; [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.)

Blue Wave, The [1982] 1 Lloyd's Rep. 151

Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A. [1984] 2 Lloyd's Rep. 98, C.A.

B.P. Exploration Co. (Libya) Ltd. v. Hunt [1976] 1 W.L.R. 788; [1976] 3 All E.R. 879

Clements v. Macaulay (1866) 4 Macph. 583

Crédit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131

European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356, C.A.

Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] 1 All E.R. 1042, H.L.(E.)

Hagen, The [1908] P. 189, C.A.

Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107, C.A.

Longworth v. Hope (1865) 3 Macph. 1049

MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.)

Sim v. Robinow (1892) 19 R. 665

Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français," 1926 S.C. 13, H.L.(Sc.)

Société Génerale de Paris v. Dreyfus Brothers (1885) 29 Ch.D 239

Trendtex Trading Corporation v. Credit Suisse [1982] A.C. 679; [1981] 3 W.L.R. 766; [1981] 3 All E.R. 520, H.L.(E.)

Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) [1949] A.C. 326; [1949] 1 All E.R. 294, H.L.(E.)

Union Carbide Corp., Re (1986) 634 F.Supp. 842

Union Industrielle et Maritime v. Petrosul International Ltd. (The Roseline) (unreported), 23 March 1984

The following additional cases were cited in argument:

Adolf Warski, The [1976] 1 Lloyd's Rep. 107; [1976] 2 Lloyd's Rep. 241, C.A.

Bruce (W.) Ltd. v. J. Strong [1951] 2 K.B. 447; [1951] 1 All E.R. 1021; [1951] 2 Lloyd's Rep. 5, C.A.

Cantieri Navali Riuniti S.p.A. v. N.V. Omne Justitia [1985] 2 Lloyd's Rep. 428, C.A.

Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.)

Indian Fortune, The [1985] 1 Lloyd's Rep. 344

Maharani Woollen Mills Co. v. Anchor Line (1927) 29 Ll.L.Rep. 169, C.A.

Media, The (1931) 41 Ll.L.Rep. 80.

Shiloh Spinners Ltd. v. Harding [1973] A.C. 691; [1973] 2 W.L.R. 28; [1973] 1 All E.R. 90, H.L.(E.)

Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803; [1978] 1 Lloyd's Rep. 1, H.L.(E.)

Ward v. James [1966] 1 Q.B. 273; [1965] 2 W.L.R. 455; [1965] 1 All E.R. 563; [1965] 1 Lloyd's Rep. 145, C.A.

Appeal from the Court of Appeal.

This was an appeal by the plaintiffs, Spiliada Maritime Corporation, by leave of the House of Lords from an order of the Court of Appeal [1985] 2 Lloyd's Rep. 116 (Neill and Oliver L.JJ.) allowing an appeal from the order of Staughton J. of 16 November 1984 whereby he had dismissed the application of the defendants, Cansulex Ltd., under R.S.C., Ord. 12, r. 8 to set aside service of proceedings upon them in British Columbia, and alternatively for a stay of the proceedings, and whereby he accordingly refused to discharge the ex parte order of Neill J. on 10 October 1983 giving leave to the plaintiffs to serve proceedings upon the defendants pursuant to R.S.C., Ord. 11, r. 1(1)(*f*)(iii).

The facts are set out in the opinion of Lord Goff of Chieveley.

Kenneth Rokison Q.C. and *Nicholas Legh-Jones* for the plaintiffs. The trial judge applied the correct test as to whether the case was a proper one for service out of the jurisdiction. He exercised his discretion in accordance with that test and therefore the Court of Appeal ought not to have intervened and substituted its own discretion: see *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1984] A.C. 50, 65–68, *per* Lord Diplock. The way in which Lord Diplock's speech has been interpreted in *Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A.* [1984] 2 Lloyd's Rep. 98 and *Ilyssia Compania Naviera S.A. v. Bamaodah* [1985] 1 Lloyd's Rep. 107 is correct—that the list of relevant factors is not exhaustive and the court has to carry out a balancing act of all the factors. [Reference was also made to *Cantieri Navali Riuniti S.p.A. v. N.V. Omne Justitia* [1985] 2 Lloyd's Rep. 428]. The Court of Appeal was only entitled to intervene and interfere with the judge's discretion in the circumstances set out by Lord Brandon of Oakbrook in *The Abidin Daver* [1984] A.C. 398, 420, namely where (1) the judge had misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) the judge, in exercising his discretion, had taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) his decision was plainly wrong. Further, in *Shiloh Spinners Ltd. v. Harding* [1973] A.C. 691, 728, Lord Simon of Glaisdale commented that the fact that the appellate court would give different weight to the various considerations assessed by the first instance court was not a reason to interfere. The judge had not only applied the correct test, but he had taken into account all relevant matters and cannot be said to have been "plainly wrong." Indeed, the judge was in the best position to weigh the relevant factors and in the particular the relevance and importance of the fact that the *Cambridgeshire* action had been fully prepared and fought in London (although it subsequently settled in the course of the trial). In the event that such circumstances were satisfied in the present case so that the Court of Appeal was entitled to consider the matter afresh and substitute its own discretion, then the fact that the defendants could rely on a time bar in British Columbia was not, as the Court of Appeal suggested, a neutral factor, but a powerful one which ought to have been weighed in the balance in the plaintiffs' favour. See *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557; *The Adolf Warski* [1976] 1 Lloyd's Rep. 107, 110; [1976] 2 Lloyd's Rep. 241; *The Blue Wave* [1982] 1 Lloyd's Rep. 151 and *Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria)* [1981] 2 Lloyd's Rep. 119.

Robert Alexander Q.C. and *Peter Goldsmith* for the defendants. The correct test to be applied is that of Lord Diplock in *Amin Rasheed* [1984] A.C. 50, 68: "The exorbitance of the jurisdiction sought to be invoked . . . is an important factor to be placed in the balance against granting leave. It is a factor that is capable of being outweighed if the would-be plaintiff can satisfy the English court that justice either could not be obtained by him in the alternative forum; or could only be obtained at excessive cost, delay or inconvenience." That passage provides an exhaustive list of the circumstances in which a plaintiff can

satisfy the burden upon him of showing that the case is a proper one for service out of the jurisdiction. The plaintiffs in the present case could not satisfy that burden. [Reference was made to *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795 as to the weight to be applied to a preference for representation by lawyers in one jurisdiction rather than another; and to *Ward v. James* [1966] 1 Q.B. 273, 293, as illustrating the correct approach to whether an appellate court may interfere with the exercise of discretion by a trial judge.] In the present case the Court of Appeal was right to review the exercise of the judge's discretion: [Detailed reference was made to the judgments and factual material]. The Court of Appeal was also right to hold that the time-bar point was a neutral factor: see: *Maharani Woollen Mills Co. v. Anchor Line* (1927) 29 Ll.L.Rep. 169; *W. Bruce Ltd. v. J. Strong* [1951] 2 K.B. 447; *The Media* (1931) 41 Ll.L.Rep. 80 and *The Indian Fortune* [1985] 1 Lloyd's Rep. 344. The existence of a time-bar was only given significance in *The Blue Wave* [1982] 1 Lloyd's Rep. 151—a case which turned very much on its facts.

Rokison Q.C. in reply. In determining whether a case is a proper one for service out of the jurisdiction, one starts with the balancing exercise, and only at a later stage does one move on to the considerations set out by Lord Diplock in the passage relied upon by the defendants at [1984] A.C. 50, 68, There, Lord Diplock was merely illustrating by reference to examples the way a plaintiff seeking to invoke the English jurisdiction could satisfy the burden placed upon him. There is no difference between that speech and that of Lord Wilberforce at p. 72. It is one and the same test—correctly applied in the *Britannia* case [1984] 2 Lloyd's Rep. 98 and the *Ilyssia* case [1985] 1 Lloyd's Rep. 107. The present is not a case where one can say that there is a natural forum. On the time-bar point, all the cases relied upon by the defendants were cases with an "exclusive jurisdiction" clause and where the same time-bar applied abroad as in England. They are not, therefore, of assistance.

Their Lordships took time for consideration.

19 November. Lord Keith of Kinkel. My Lords, I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend Lord Goff of Chieveley. I agree with it and for the reasons he gives would allow the appeal and restore the order of Staughton J.

Lord Templeman. My Lords, in these proceedings parties to a dispute have chosen to litigate in order to determine where they shall litigate. The principles which the courts of this country should apply are comprehensively reviewed and closely analysed in the speech of my noble and learned friend Lord Goff of Chieveley. Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the

plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere.

In the present case, a vessel managed partly in Greece and partly in England, flying the flag of Liberia and owned by a Liberian corporation is said to have been damaged by a cargo loaded by a British Columbia shipper and carried from Vancouver to India. Both sets of insurers are English. Similar litigation took place in Canada concerning the vessel *Roseline*. Similar litigation took place in England over another vessel, the *Cambridgeshire*, after Staughton J. had refused to stay the action. If Staughton J. had good reason to try the *Cambridgeshire*, it is difficult to see that he had bad reason for trying the *Spiliada*.

The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case. Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose. In the present case, for example, it is reasonably clear that Cansulex prefer the outcome of the *Roseline* proceedings in Canada to the outcome of the *Cambridgeshire* proceedings in England and prefer the limitation period in British Columbia to the limitation period in England. The shipowners and their insurers hold other views. There may be other matters which naturally and inevitably help to produce in a good many cases conflicting evidence and optimistic and gloomy assessments of expense, delay and inconvenience. Domicile and residence and place of incident are not always decisive.

In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere. I agree with my noble and learned friend Lord Goff of Chieveley that there were no grounds for interference in the present case and that the appeal should be allowed.

Lord Griffiths. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Goff of Chieveley. For the reasons they give I would allow the appeal.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Goff of Chieveley. I agree with them and for the reasons which they give I would allow the appeal.

LORD GOFF OF CHIEVELEY. My Lords, there is before your Lordships an appeal, brought by leave of your Lordships' House, against a decision of the Court of Appeal [1985] 2 Lloyd's Rep. 116 (Oliver and Neill L.JJ.) whereby they reversed a decision of Staughton J. in which he refused an application by the respondents, Cansulex Ltd., to set aside leave granted ex parte to the appellants, Spiliada Maritime Corporation, to serve proceedings on the respondents outside the jurisdiction. The effect of the decision of the Court of Appeal was, therefore, to set aside the leave so granted and the proceedings served on the respondents pursuant to that leave.

(1) *The facts of the case*

As this appeal is concerned with an interlocutory application, I must, like the courts below, take the facts from the affidavit evidence filed on behalf of the parties. The appellants (whom I shall refer to as "the shipowners") claim to be (and can, for the purposes of this appeal, be accepted as being) the owners of a bulk carrier, of about 20,000 tonnes deadweight, called *Spiliada*. The shipowners are a Liberian Corporation, and their vessel flies the Liberian flag; but their managers are in Greece, though some part of the management takes place in England. The respondents (whom I shall refer to as "Cansulex") carry on business in British Columbia as exporters of sulphur. The shipowners chartered their vessel to an Indian company called Minerals & Metals Trading Corporation of India Ltd. (whom I shall refer to as "M.M.T.C.") under a voyage charter dated 6 November 1980, for the carriage of a cargo of sulphur from Vancouver to Indian ports. The charterparty contained a London arbitration clause. Pursuant to that charterparty, the vessel proceeded to Vancouver and there loaded a cargo of sulphur between 18 and 25 November 1980. The sulphur was loaded on board the vessel by order of Cansulex, who were f.o.b. sellers of the sulphur to M.M.T.C. Bills of lading were then issued to, and accepted by, Cansulex. The bills were shipped bills, Cansulex being named as shippers in the bills. Clause 21 on the reverse of the bills of lading provided that, subject to certain clauses which are for present purposes immaterial, the bills of lading "no matter where issued, shall be construed and governed by English law, and as if the vessel sailed under the British flag." The bills were signed by agents for and by authority of the master. The cargo was discharged at ports in India between 29 December 1980 and 6 February 1981.

It has been alleged by the shipowners that the cargo of sulphur so loaded on the vessel was wet when loaded and as a result caused severe corrosion and pitting to the holds and tank tops of the vessel. The shipowners have claimed damages from Cansulex in respect of the damage so caused. The shipowners rely upon the age of the ship at the

time of the voyage (she was then three years old) and the condition of the holds before and after the voyage. The shipowners have advanced their claim against Cansulex as shippers under the contract of carriage contained in or evidenced by the bills of lading to which I have already referred, basing their claim on article 4, rule 6, of the Hague Rules (contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels, 25 August 1924) incorporated into the bills, and on a warranty implied by English law that dangerous cargo will not be shipped without warning. Arbitration proceedings have also been commenced by the shipowners against M.M.T.C. in London under the arbitration clause in the voyage charter. It is open to M.M.T.C. to bring arbitration proceedings in London against Cansulex under the sale contract between them, by virtue of the London arbitration clause in that contract. Leave was obtained by the shipowners to issue and serve a writ upon Cansulex outside the jurisdiction on a ground contained in the then R.S.C., Ord. 11, r. 1(1)(*f*)(iii), viz. that the action was brought to recover damages in respect of breach of a contract which was by its terms governed by English law.

Cansulex then applied for an order to set aside such leave and all subsequent proceedings. The application came before Staughton J. on 26 October 1984. The hearing of the application took place while there was proceeding before Staughton J. a very similar action, in which Cansulex were also defendants. That action concerned a ship called the *Cambridgeshire*, owned by an English company, Bibby Bulk Carriers Ltd. In it, the owners claimed damages for damage alleged to have been caused to their vessel by a cargo of sulphur loaded on her at Vancouver in November and December 1980, for carriage to South Africa and Mozambique. The defendants in the action were the charterers of the ship, Cobelfret NV, and three shippers—Cansulex, Petrosul International Ltd., and Canadian Superior Oil Ltd. In that action, Cansulex (supported by Petrosul International Ltd., another Canadian company) who had been served with proceedings outside the jurisdiction on the same ground as in the present case, applied in September 1982 for the leave to serve proceedings upon them outside the jurisdiction, and all subsequent proceedings, to be set aside. Staughton J. heard that application and dismissed it, holding that there was a good arguable case that the Canadian companies were parties to a contract governed by English law, and that the case was a proper one for service out of the jurisdiction. There was no appeal from that decision. The trial of the *Cambridgeshire* action started on 15 October 1984, again before Staughton J. He recorded in his judgment in the present case that there were no less than 15 counsel engaged in the *Cambridgeshire* action; that each was equipped with 75 files; and that the then estimate for the length of the trial was six months.

There has been another set of proceedings concerning damage to a vessel alleged to have been caused by a wet sulphur cargo shipped at Vancouver, *Union Industrielle et Maritime v. Petrosul International Ltd.* (unreported), 23 March 1984. This concerned a ship called the *Roseline*. The matter came before a Canadian Federal Court in March 1984, the

defendant being Petrosul International Ltd. The owners of the *Roseline* claimed a declaration that a contract existed between them and Petrosul under which disputes were to be referred to arbitration in Paris. The contract was said to have been contained in or evidenced by a bill of lading, in which Petrosul were named as shippers. Reed J. upheld a contention by Petrosul that they were not a party to any contract with the owners, or at least not a party to any contract containing an arbitration clause; her conclusion was reached on the basis that the bill of lading, in the hands of Petrosul, "partook of the nature of a receipt or a document of title," and that use for this purpose did not make the document a contractual one so far as Petrosul were concerned. There is doubt whether a similar conclusion would be reached in English law; Staughton J. was told that there was an unreported decision of Mustill J. to the contrary effect. However, Staughton J. held, and it is now accepted by Cansulex, that in the present case there is a good arguable case that Cansulex were parties to the bill of lading contract, and so parties to a contract governed by English law.

It is right that I should record that the judge was told that there were other disputes concerning similar damage to ships alleged to have been caused by sulphur loaded at Vancouver; but he knew no more about them.

(2) *The decision of Staughton J.*

The judge approached the application of Cansulex in the present case as follows. Having concluded that there was a good arguable case that the shipowners and Cansulex were parties to a contract governed by English law, he then proceeded to consider whether the case had been shown to be, as a matter of discretion, a proper case for service out of the jurisdiction. He referred first to the decision of this House in *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1984] A.C. 50, and in particular to certain passages (which I will quote later) from the speeches in that case of Lord Diplock, at p. 65, and Lord Wilberforce, at p. 72, and to a suggested conflict between those two passages; but, following a decision of the Court of Appeal in *Ilyssia Compania Naviera S.A. v. Bamaodah* [1985] 1 Lloyd's Rep. 107, he concluded that the suggested conflict was more apparent than real, and that the appropriate test for him to apply was that, if the English court is shown to be distinctly more suitable for the ends of justice, then the case is a proper one for service out of the jurisdiction. He then said:

> "In considering the exercise of discretion I must, of course, assume that the *Spiliada* action will come to trial eventually, either in England or in Canada. In fact, that seems to me improbable. After the *Cambridgeshire* proceedings have reached a final conclusion, with vast expenditure of money, time and effort, I think it very likely that the parties to the *Spiliada* dispute will have little appetite for litigation, and will reach a compromise. Cansulex feature as defendants in both actions, and are presently represented by the same solicitors and counsel in both. The plaintiff shipowners are, of course, different in the two actions, but they too are represented by

the same solicitors and counsel, and it may be that they are supported by the same insurers. So I suspect that what I am in fact deciding is not where the *Spiliada* action will ultimately be tried, but whether a settlement will be reached against the background of litigation pending in England or of litigation pending in Canada. Nevertheless, it is the prospect of a trial which provides the sanction to induce a settlement, and in my judgment I must decide this application on the assumption that a trial there will be."

This was, so far as the *Cambridgeshire* action was concerned, a prescient observation. For, on 18 January 1985, the parties to that action settled their differences. Furthermore his thought that "it may be that [the shipowners] are supported by the same insurers" was one which would certainly have occurred to other experienced commercial practitioners, and the judge's tentative inference that both the *Cambridgeshire* and the *Spiliada* were entered in the same P. and I. club was confirmed before your Lordships; indeed the solicitors acting for the owners in both cases have commenced proceedings against a number of Canadian sulphur exporters, including Cansulex, on behalf of various shipowners all entered in the same P. & I. club.

The judge then turned to consider the various factors which were said to influence the choice between an English and Canadian court. I need not list them all. The most important were (1) availability of witnesses, (2) multiplicity of proceedings, and (3) a matter which was regarded as crucial by the judge, which I will call the *Cambridgeshire* factor and which relates to preparation for very substantial proceedings.

On availability of witnesses, the judge had this to say:

"Apart from those matters, I now have, after listening to the opening speech in the *Cambridgeshire* trial for 15 days, a somewhat clearer picture of what the relative importance of the issues is likely to be. The principal or most important events in the case occurred in Vancouver, but many events of significance occurred in many other places. The most important witnesses of fact will be from Cansulex and various other concerns in Vancouver, and the ship's officers. But there are likely to be a great many witnesses from other places. In the *Cambridgeshire* applications I concluded that, in terms of witness/hours, events in Vancouver were likely to loom largest at the trial. I am no longer convinced that that was right, even leaving out of account the expert evidence. Certainly, there will be a very substantial body of evidence dealing with events which did not take place in Vancouver. As to the expert witnesses, I am told that all but one of them in the *Cambridgeshire* are English. But, as I then said, experts can travel, or be replaced by other experts.

"It is true that the *Cambridgeshire* plaintiffs are an English company and the ship is British, whereas the *Spiliada* plaintiffs are Liberian; so is their ship; and their managers are in Greece, although some part of the management takes place in England. That means that the *Spiliada* action has much less connection with England, but it does not give it any greater connection with

Vancouver. It is also true that two witnesses in the *Cambridgeshire* action decline to come to England to give evidence, so that their evidence will have to be taken on commission in North America. Nevertheless, I reach the clear conclusion that Vancouver is not overall a more suitable place for trial than England in terms of the convenience of witnesses. Indeed, if one assumes that the parties will wish to have the same experts as in the *Cambridgeshire*, I would say that England is shown to be more suitable."

I should interpolate that the judge was not right in thinking that all but one of the experts in the *Cambridgeshire* action were English; in fact, two of the defendants' experts came from England and four from elsewhere (one from Canada, one from the United States, and two from Europe—from Scandinavia and Greece). This was drawn to the judge's attention at the end of his judgment. The judge then stated that he did not however regard this difference as significant—no doubt he had it in mind that all the owners' experts were from England.

Next, turning to the question of multiplicity of proceedings, he referred to the facts that Cansulex wished to join their insurers and possibly others as third parties, which they could only do in Canada, and that the shipowners wished to join M.M.T.C. as co-defendants with Cansulex, which would obviously be a sensible course if it could be achieved. As to the former, he gave the same weight to it as he did in the *Cambridgeshire* application; as to the latter, he gave less, because, whereas the relevant charterers were joined as co-defendants in the *Cambridgeshire* action, in the present case (following, it appears, lobbying by both sides) he felt that he should regard the shipowners' objective of joining M.M.T.C. as problematical.

Turning to the *Cambridgeshire* factor, which he regarded as crucial, the judge had this to say:

"But at the end of the day what seems to me important is this. Mr. Evans submits that Cansulex, having been put to the trouble and expense of bringing their witnesses and senior executives here once, should not have to bear the same burden again. Mr. Rokison replies that litigation is not like a football or cricket season, with one fixture at home and the other away. The trouble with such an attractive analogy or metaphor is that it tends to take one's eye off the ball, so to speak. Indeed, if all other things were equal, I should be inclined to hold that even-handed justice *would* be served best if one action were tried here and the other in Canada. But all other things are far from equal. The plaintiff's solicitors have made all the dispositions and incurred all the expense for the trial of one action in England; they have engaged English counsel and educated them in the various topics upon which expert evidence will be called; they have engaged English expert witnesses; and they have assembled vast numbers of documents. They have also, no doubt, educated themselves upon the issues in the action. All that has been done on behalf of Cansulex as well, save that one of their expert witnesses is Canadian. If they now wish to start the process again in Canada, that is their choice. But it seems to me that the additional

inconvenience and expense which would be thrust upon the plaintiffs if this action were tried in Canada far outweighs the burden which would fall upon Cansulex if they had to bring their witnesses and senior executives here a second time.

"There might have been an appeal from my decision on the *Cambridgeshire* applications, but there was not. I appreciate that there are a number of significant points of distinction between the two cases, including the principal ones that I have mentioned. It may then in a sense be hard on Cansulex if the decision reached on the *Cambridgeshire* applications should have the effect of determining their application in this case. But in my judgment it does, in the circumstances and for the reasons that I have mentioned. Overall it would be wasteful in the extreme of talent, effort and money if the parties to this case were to have to start again in Canada. The case is a proper one for service out of the jurisdiction."

On that basis, the judge decided not to accede to Cansulex's application. After he had prepared his judgment, evidence was placed before him on behalf of the shipowners with regard to the relevant limitation period applicable in British Columbia. It transpired that that period was two years, and had expired by November 1982, long before the hearing of Cansulex's application before the judge. The shipowners sought to rely on this point, apparently on the basis that to send the case back to British Columbia would deprive them of a legitimate juridical advantage in this country. However the judge, having already concluded that the action should be tried here, irrespective of the time bar point, did not think it necessary to consider that matter.

(3) *The decision of the Court of Appeal*

In the Court of Appeal [1985] 2 Lloyd's Rep. 116, Neill L.J. (who delivered the first judgment) referred to the speech of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, 220 and both he and Oliver L.J. referred to the speech of my noble and learned friend Lord Brandon of Oakbrook in *The Abidin Daver* [1984] A.C. 398, 420, which state the limited grounds upon which an appellate court may interfere with the exercise of a trial judge's discretion. They also, like the judge, regarded themselves bound by the decision of the Court of Appeal in the *Ilyssia* case [1985] 1 Lloyd's Rep. 107 to regard the difference between the speeches of Lord Diplock and Lord Wilberforce in the *Amin Rasheed* case [1984] A.C. 50 as more apparent than real. Neill L.J. reviewed the judge's assessment of the various factors as follows. With regard to the availability of witnesses, he felt that, even on the judge's own analysis of the facts, the convenience of the parties and the witnesses probably tilted the scales towards British Columbia as the forum, but certainly did not show that an English court was "distinctly more suitable for the ends of justice." On multiplicity of proceedings, he saw force in the criticism of Mr. Goldsmith (counsel for Cansulex) that this was at most a neutral factor, and certainly did not bring the scales down heavily on the side of England. On the relevance of the *Cambridgeshire* factor, while rejecting Mr. Goldsmith's primary

submission that the *Cambridgeshire* litigation was wholly irrelevant, he considered that the judge attached far too much importance to it. He said [1985] 2 Lloyd's Rep. 116, 124:

> "The fact that the London solicitors who are presently acting are firms of great eminence and the further fact that members of these firms have acquired detailed knowledge about the shipment of sulphur cargoes from Vancouver are pointers to trial in England but should not be regarded as of decisive importance if other factors tilt the balance the other way."

He held that it was impossible to conclude that the relevant factors, when taken together, showed that the English court was distinctly more suitable for the ends of justice. On this view of the case, it became necessary for him to consider the impact of the time bar in British Columbia. On that he adopted the view of Oliver L.J. that the existence of a time bar was a neutral factor. He therefore decided to allow the appeal.

Oliver L.J., like Neill L.J., accepted that they were bound to follow the decision of the Court of Appeal in the *Ilyssia* case, on the basis of which he thought it right to follow the view of Lord Wilberforce in the *Amin Rasheed* case; and he did not therefore accept the submission of Mr. Goldsmith for Cansulex that the judge had propounded the wrong test. He then considered the exercise of the judge's discretion. He reviewed the judge's assessment of the availability of witnesses in considerable detail; and pointed out that the judge had proceeded on an erroneous assumption that all the experts in the *Cambridgeshire* action were English. He went on to express the opinion that the supposed advantages of England as a forum were, in this respect, far less clear cut than the judge had appeared to have imagined. In his opinion, the highest that it could be put on the shipowners' side was that the factor of convenience of witnesses was neutral. He then considered the point of multiplicity of proceedings, and rejected criticism of the judge's approach because the point seemed to him to have played a neutral role in the judge's decision. Turning to the *Cambridgeshire* factor, he was very critical of the judge's approach. He summarised Mr. Goldsmith's principal criticism at [1985] 2 Lloyd's Rep. 116, 133:

> "But what, Mr. Goldsmith asks forensically, does all that amount to beyond this, that the plantiffs say, in effect, 'we wish, for the purposes of our own and because it is convenient to do so, to retain the services of particular legal advisers and experts who happen to be resident and practising in England. Therefore, our desire to retain English legal advisers makes England a more appropriate forum for the hearing of the dispute?'"

Oliver L.J. accepted that criticism as well-founded. He concluded that, in giving to the *Cambridgeshire* action the decisive and conclusive weight that he did, the judge erred in principle.

Finally, Oliver L.J. considered the impact of the time bar in British Columbia. He came to the conclusion that the time bar was not of itself a factor which ought to carry the day. The difficulty in the way of the

shipowners' argument that, by sending the case to be tried in British Columbia, they would be deprived of a legitimate juridical advantage in that the action was not time-barred in England, was that what was one side's advantage must be another's disadvantage. This pointed, of course, to a time bar being regarded as a neutral factor. Even if, following the decision of Sheen J. in *The Blue Wave* [1982] 1 Lloyd's Rep. 151, it was to be treated as a factor on which the shipowners as plaintiffs could rely unless they had acted unreasonably in allowing the time bar to elapse in the relevant foreign jurisdiction, that could be of no benefit to the shipowners in the present case, because there was no evidence tendered on their behalf providing any satisfactory explanation why no steps were taken to ascertain what the law of British Columbia was. Furthermore, the factor of the time bar in British Columbia could not in any event be conclusive; because the evidence showed that it was open to the shipowners to sue Cansulex in the Federal Court in any province in Canada. Accordingly, in agreement with Neill L.J., he decided that the appeal of Cansulex should be allowed.

(4) *Submissions of counsel*

Before your Lordships, the shipowners submitted that the Court of Appeal, having accepted that the judge applied the correct test, went beyond their limited power of review of the exercise of the judge's discretion. The real reason for their intervention was that they disagreed with the weight attached by the judge to the *Cambridgeshire* factor and were then, it was submitted, over-astute to discover an error which would enable them to substitute their own discretion for his. For Cansulex, on the other hand, it was submitted that the Court of Appeal were fully entitled to interfere with the judge's exercise of his discretion, substantially for the reasons given by them; but it was further submitted that, in any event, both the judge and the Court of Appeal should have applied the more stringent test set out in the passage from Lord Diplock's speech in the *Amin Rasheed* case [1984] A.C. 50, 68, which, if correctly applied, should certainly have led to the same order as that made by the Court of Appeal.

In considering the submissions of counsel, for whose assistance I am most grateful, it is necessary to review the applicable principles. I say this for two particular reasons. First, since the courts below have been troubled by apparent differences between observations of Lord Diplock and Lord Wilberforce in the *Amin Rasheed* case, it is, I think, desirable that this House should now resolve those differences. Second, since the question of the relevance of a time bar has now arisen in a number of cases, including the present, it is desirable that this House should give further consideration to the relevance of what has been called a "legitimate personal or juridical advantage," with special reference to time bars. But, in any event, the law on this subject is still in a state of development; and it is perhaps opportune to review the position at this stage, and in particular to give further consideration to the relationship between cases where jurisdiction has been founded as of right by service of proceedings on the defendant within the jurisdiction, but the defendant seeks a stay of the proceedings on the ground of forum non conveniens,

and cases where the court is invited to exercise its discretion, under R.S.C., Ord. 11, to give leave for service on the defendant out of the jurisdiction.

(5) *The fundamental principle*

In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In *The Abidin Daver* [1984] A.C. 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:

> "the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

For earlier statements of the principle, in similar terms, see *Longworth v. Hope* (1865) 3 Macph. 1049, 1053, *per* Lord President McNeill, and *Clements v. Macaulay* (1866) 4 Macph. 583, 592, *per* Lord Justice-Clerk Inglis; and for a later statement, also in similar terms, see *Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français,"* 1926 S.C.(H.L.) 13, 22, *per* Lord Sumner.

I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of "mere practical convenience." Such a suggestion was emphatically rejected by Lord Kinnear in *Sim v. Robinow*, 19 R. 665, 668, and by Lord Dunedin, Lord Shaw of Dunfermline and Lord Sumner in the *Société du Gaz* case, 1926 S.C.(H.L.) 13, 18, 19, and 22 respectively. Lord Dunedin, with reference to the expressions forum non competens and forum non conveniens, said, at p. 18:

> "In my view, 'competent' is just as bad a translation for 'competens' as 'convenient' is for 'conveniens.' The proper translation for these Latin words, so far as this plea is concerned, is 'appropriate.'"

Lord Sumner referred to a phrase used by Lord Cowan in *Clements v. Macaulay* (1866) 4 Macph. 583, 594, viz. "more convenient and preferable for securing the ends of justice," and said, at p. 22:

A "one cannot think of convenience apart from the convenience of the pursuer or the defender or the court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as 'more convenient, that is to say, preferable, for securing the ends of justice,' I think the true meaning of the doctrine is arrived at. The object, under the words 'forum non conveniens' is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends."

In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word "convenience" and to refer rather, as Lord Dunedin did, to the *appropriate* forum.

(6) *How the principle is applied in cases of stay of proceedings*

When the principle was first recognised in England, as it was (after a breakthrough in *The Atlantic Star* [1974] A.C. 436) in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, it cannot be said that the members of the Judicial Committee of this House spoke with one voice. This is not surprising; because the law on this topic was then in an early stage of a still continuing development. The leading speech was delivered by Lord Diplock. He put the matter as follows, at p. 812:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative; (*a*) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (*b*) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

This passage has been quoted on a number of occasions in later cases in your Lordships' House. Even so, I do not think that Lord Diplock himself would have regarded this passage as constituting an immutable statement of the law, but rather as a tentative statement at an early stage of a period of development. I say this for three reasons. First, Lord Diplock himself subsequently recognised that the mere existence of "a legitimate personal or juridical advantage" of the plaintiff in the English jurisdiction would not be decisive: see *The Abidin Daver* [1984] A.C. 398, 410, where he recognised that a balance must be struck. Second, Lord Diplock also subsequently recognised that no distinction is now to be drawn between Scottish and English law on this topic, and that it can now be said that English law has adopted the Scottish principle of forum non conveniens: see *The Abidin Daver* [1984] A.C. 398, 411. It is necessary therefore now to have regard to the Scottish authorities; and in this connection I refer in particular, not only to statements of the fundamental principle, but also to the decision of your Lordships' House in the *Société du Gaz* case, 1926 S.C.(H.L.) 13. Third, it is necessary to strike a note of caution regarding the prominence given

to "a legitimate personal or juridical advantage" of the plaintiff, having regard to the decision of your Lordships' House in *Trendtex Trading Corporation v. Credit Suisse* [1982] A.C. 679, in which your Lordships unanimously approved the decision of the trial judge to exercise his discretion to stay an action brought in this country where there existed another appropriate forum, i.e., Switzerland, for the trial of the action, even though by so doing he deprived the plaintiffs of an important advantage, viz. the more generous English procedure of discovery, in an action involving allegations of fraud against the defendants.

In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the *Société du Gaz* case, 1926 S.C.(H.L.) 13, 21, *per* Lord Sumner; and *Anton, Private International Law* (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favor of the defendant,": see *Scoles and Hay, Conflict of Laws* (1982), p. 366, and cases there cited; and also in Canada, where it has been stated (see *Castel, Conflict of Laws* (1974), p. 282) that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred

by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the *Société du Gaz* case, 1926 S.C.(H.L.) 13, 21, where he said:

> "All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer."

However, I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum—in *The Atlantic Star* [1974] A.C. 436 (Belgium); in *MacShannon*'s case [1978] A.C. 795 (Scotland); in *Trendtex* [1982] A.C. 679 (Switzerland); and in the *The Abidin Daver* [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon*'s case [1978] A.C. 795, *per* Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon*'s case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin*

Daver [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356. It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the *The Abidin Daver* [1984] A.C. 398, 411, *per* Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage.

(7) *How the principle is applied in cases where the court exercises its discretionary power under R.S.C., Ord. 11*

As I have already indicated, an apparent difference of view is to be found in the speeches of Lord Diplock and Lord Wilberforce in the *Amin Rasheed* case [1984] A.C. 50. In that case, Lord Diplock said, at pp. 65-66:

> "the jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of granting leave under R.S.C., Ord. 11, r.1(1)(*f*) for service out of the jurisdiction of a writ on that corporation, is an exorbitant jurisdiction, i.e., it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition. Comity thus dictates that the judicial discretion to grant leave under this paragraph of R.S.C., Ord. 11, r.1(1) should be exercised with circumspection in cases where there exists an alternative forum, viz. the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules."

Again, he said, at p. 68:

"the onus under R.S.C., Ord. 11, r.4(2) of making it 'sufficient to appear to the court that the case is a proper one for service out of the jurisdiction under this Order' lies upon the would-be plaintiff. Refusal to grant leave in a case falling within rule 1(1)(*f*) does not deprive him of the opportunity of obtaining justice, because ex hypothesi there exists an alternative forum, the courts of the country where the proposed defendant has its place of business where the contract was made, which would be recognised by the English courts as having jurisdiction over the matter in dispute and whose judgment would be enforceable in England.

"The exorbitance of the jurisdiction sought to be invoked where reliance is based exclusively upon rule 1(1)(*f*)(iii) is an important factor to be placed in the balance against granting leave. It is a factor that is capable of being outweighed if the would-be plaintiff can satisfy the English court that justice either could not be obtained by him in the alternative forum; or could only be obtained at excessive cost, delay or inconvenience."

In contrast, Lord Wilberforce said, at p. 72:

"R.S.C., Ord. 11, r. 1 merely states that, given one of the stated conditions, such service is permissible, and it is still necesssary for the plaintiff (in this case the appellant) to make it 'sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order' (r.4(2)). The rule does not state the considerations by which the court is to decide whether the case is a proper one, and I do not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad. The situations are different: compare the observations of Stephenson L.J. in *Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria)* [1981] 2 Lloyd's Rep. 119, 129. The intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense."

In the *Ilyssia* case [1985] 1 Lloyd's Rep. 107, the Court of Appeal had to consider the apparent difference between the two approaches expressed by Lord Diplock and Lord Wilberforce. Ackner L.J. resolved the difference as follows, at p. 113:

"Mr. Gross submits that Lord Diplock's statement was intended to be an exhaustive one. When reliance is based exclusively upon r.1(1)(*f*)(iii), it is *only* capable of being outweighed if the would-be plaintiff can satisfy the English court that either justice cannot be obtained by him in the alternative forum or could only be obtained at excessive cost, delay or inconvenience. Like Staughton J., I do not accept that submission. As I read the speech in the context of

that case as a whole Lord Diplock was emphasising that where exclusive reliance is placed upon r.1(1)(*f*)(iii) then the burden of showing good reasons justifying service out of the jurisdiction is a particularly heavy one, and he illustrated this by the examples which he gave of situations which were capable of tipping the balance in favour of the granting of leave. Thus constructed, as the judge points out, there is no conflict between Lord Diplock's statement and that of Lord Wilberforce . . . Lord Wilberforce there states that in order to decide whether the case is a proper one the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense."

May L.J. spoke in similar terms, at p. 118. The practical effect was, however, as is reflected in the judgment of Oliver L.J. [1985] 2 Lloyd's Rep. 116, 127, in the present case, that the statement of principle of Lord Wilberforce was accepted as being the applicable principle.

With that conclusion, I respectfully agree; but I wish to add some observations of my own. The first is this. Lord Wilberforce said that he did not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad; in this connection he referred to certain observations of Stephenson L.J. in *Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria)* [1981] 2 Lloyd's Rep. 119, 129. It is right to point out that, in the relevant passage in his judgment in that case, Stephenson L.J. was only expressing caution with regard to assimilating cases of a stay to enforce a foreign jurisdiction clause with cases of a stay on the principle of forum non conveniens under *MacShannon*'s case [1985] A.C. 795. He was not addressing himself to the question of the applicable principles under R.S.C., Ord. 11, and, while sharing Lord Wilberforce's concern about help to be derived, in Order 11 cases, from cases where an injunction is sought to restrain proceedings abroad, I respectfully doubt whether similar concern should be expressed about help to be derived from cases of forum non conveniens. I cannot help remarking upon the fact that when Lord Wilberforce came, at the end of the passage from his speech which I have quoted, to state the applicable principle, his statement of principle bears a marked resemblance to the principles applicable in forum non conveniens cases. It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in *Sim v. Robinow*, 19 R. 665, 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. That being said, it is desirable to identify the distinctions between the two groups of cases. These, as I see it, are threefold. The first is that, as Lord Wilberforce indicated, in the Order 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to

permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power *may be* exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction:" see R.S.C., Ord. 11, r.4(2).

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the *Amin Rasheed* case [1984] A.C. 50, 65, that the jurisdiction exercised under Order 11 may be "exorbitant." This has long been the law. In *Société Générale de Paris v. Dreyfus Brothers* (1885) 29 Ch.D. 239, 242–243, Pearson J. said:

> "it becomes a very serious question . . . whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."

That statement was subsequently approved on many occasions, notably by Farwell L.J. in *The Hagen* [1908] P. 189, 201, and by Lord Simonds in your Lordships' House in *Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo)* [1949] A.C. 326, 350. The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right.

Even so, a word of caution is necessary. I myself feel that the word "exorbitant" is, as used in the present context, an old-fashioned word which perhaps carries unfortunate overtones: it means no more than that the exercise of the jurisdiction is extraordinary in the sense explained by Lord Diplock in the *Amin Rasheed* case [1984] A.C. 50, 65. Furthermore, in Order 11 cases, the defendant's place of residence may be no more than a tax haven to which no great importance should be attached. It is also significant to observe that the circumstances specified in Order 11, r. 1(1), as those in which the court may exercise its discretion to grant leave to serve proceedings on the defendant outside the jurisdiction, are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g., where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in *B.P. Exploration Co. (Libya) Ltd. v. Hunt* [1976] 1 W.L.R. 788, where, in my opinion, Kerr J. rightly granted leave to serve proceedings on the defendant out of the jurisdiction); or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in

my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate.

(8) *Treatment of "a legitimate personal or juridical advantage"*

Clearly, the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the *Société du Gaz* case, 1926 S.C.(H.L.) 13, 22:

> "I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win."

Indeed, as Oliver L.J. [1985] 2 Lloyd's Rep. 116, 135, pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in *Sim v. Robinow*, 19 R. 665, 668.

The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice." Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas. In this, I recognise that we appear to be differing from the approach presently prevailing in the United States: see, e.g., the recent opinion of Judge Keenan in *Re Union Carbide Corp.* (1986) 634 F.Supp. 842 in the District Court for the Southern District of New York, where a stay of proceedings in New York, commenced on behalf of Indian plaintiffs against Union Carbide

A arising out of the tragic disaster in Bhopal, was stayed subject to, inter alia, the condition that Union Carbide was subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by the plaintiff. But in the *Trendtex* case [1982] A.C. 679, this House thought it right that a stay of proceedings in this country should be granted where the appropriate forum was Switzerland, even though the plaintiffs were thereby deprived of the advantage of the B more extensive English procedure of discovery of documents in a case of fraud. Then take the scale on which damages are awarded. Suppose that two parties have been involved in a road accident in a foreign country, where both were resident, and where damages are awarded on a scale substantially lower than those awarded in this country. I do not think that an English court would, in ordinary circumstances, hesitate to stay C proceedings brought by one of them against the other in this country merely because he would be deprived of a higher award of damages here.

But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases. For example, it would not, I think, normally be wrong to allow a plaintiff to keep the benefit D of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum. Such a conclusion is, I understand, consistent with the manner in which the process of saisie conservatoire is applied in civil law countries; and cf. section 26 of the Civil Jurisdiction and Judgments Act 1982, now happily in force. Again, take the example E of cases concerned with time bars. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the F plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court G should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical H justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is

elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with that of Sheen J. in *The Blue Wave* [1982] 1 Lloyd's Rep. 151. It is not to be forgotten that, by making its jurisdiction available to the plaintiff—even the discretionary jurisdiction under R.S.C., Ord. 11—the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of having complied with the time bar in this country. Furthermore, as the applicable principles become more clearly established and better known, it will, I suspect, become increasingly difficult for plaintiffs to prove lack of negligence in this respect. The fact that the court has been asked to exercise its discretion under R.S.C., Ord. 11, rather than that the plaintiff has served proceedings upon the defendant in this country as of right, is, I consider, only relevant to consideration of the plaintiff's conduct in failing to save the time bar in the other relevant alternative jurisdiction. The appropriate order, where the application of the time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay, or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction; this is apparently the practice in the United States of America.

(9) *Application of the principles to the facts of the present case*

The judge proceeded on the basis that the relevant test was that "if the English court is shown to be distinctly more suitable for the ends of justice, then the case is a proper one for service out of the jurisdiction." The applicable principles are, I believe, as I have stated them to be; and the judge's approach was in accordance with those principles. I am therefore unable to accept the submission made on behalf of Cansulex that there was any material error of principle on the part of the judge.

I turn then to the question whether the Court of Appeal was entitled to interfere with the judge's exercise of his discretion. First, I take the criticism of the judge's assessment of the factor of availability of witnesses. It was said that he erred in thinking that all Cansulex's expert witnesses in the *Cambridgeshire* action were from England, whereas in fact two were from England, and four were from elsewhere. However, as I have recorded, this was drawn to his attention at the end of his judgment: he then took into account the true position, and said that this difference was not of significance. No doubt, in making that observation, he had it in mind that all the owners' expert witnesses in the *Cambridgeshire* action were from England. Next, Neill L.J. commented [1985] 2 Lloyd's Rep. 116, 123 that

> "even on his own analysis of the facts the convenience of the parties and the witnesses probably tilted the scales towards British Columbia

as the forum, but certainly did not show that an English court would be 'distinctly more suitable for the ends of justice.'"

Similar observations were made by Oliver L.J. For my part, I consider, with all respect, that these comments were not justified. At this stage, the judge did not have to apply the overall test, but merely to assess the merits of the particular factor under consideration; and I cannot help but think that the judge, with all his experience derived from hearing a substantial part of the *Cambridgeshire* action, was better placed to make an assessment of this factor than the Court of Appeal.

Turning to the factor of multiplicity of proceedings, the judge referred to the possibility of M.M.T.C. being joined as co-defendants in the English proceedings as problematical. Before the Court of Appeal, Mr. Goldsmith submitted on behalf of Cansulex that the other proceedings were at most a neutral factor and certainly did not bring the scales down on the side of England. Neill L.J. saw force in this criticism. But, once again, the judge did not have to decide, and did not decide, that this particular factor was decisive of the case. Moreover, if (as I think) the judge gave weight to this factor, he was, in my judgment, entitled to do so. There is much to be said, in the interests of justice, in favour of the shipowners' claims against both Cansulex and M.M.T.C. being tried in the same proceedings; and, having regard to the advice given to M.M.T.C. by their solicitors, there was a prospect that, if it was decided that the case should be heard in England, M.M.T.C. would, acting in their own interests, accept their own solicitors' advice. Indeed, if this were to happen, it might also be agreed that a claim over by M.M.T.C. against Cansulex should be included in the same proceedings, rather than be arbitrated in London under an arbitration clause in the sale contract.

But the crucial point, in the judge's view, was the *Cambridgeshire* factor. This was regarded, certainly by Neill L.J., as relevant; and in this I find myself to be in agreement. The criticism of the judge's view of this factor goes, therefore, to its weight, as Neill L.J. indicated [1985] 2 Lloyd's Rep. 116, 124 when he said that it seemed to him that the judge attached far too much importance to this factor. With all respect, however, when I read the judgments of both the Lords Justices, I consider that they underrated it. I believe that anyone who has been involved, as counsel, in very heavy litigation of this kind, with a number of experts on both sides and difficult scientific questions involved, knows only too well what the learning curve is like; how much information and knowledge has to be, and is, absorbed, not only by the lawyers but really by the whole team, including both lawyers and experts, as they learn about the interrelation of law, fact and scientific knowledge, having regard to the contentions advanced by both sides in the case, and identify in their minds the crucial matters on which attention has to be focused, why these are the crucial matters, and how they are to be assessed. The judge in the present case has considerable experience of litigation of this kind, and is well aware of what is involved. He was, in my judgment, entitled to take the view (as he did) that this matter was not merely of advantage to the shipowners, but also constituted an

advantage which was not balanced by a countervailing equal disadvantage to Cansulex; and (more pertinently) further to take the view that having experienced teams of lawyers and experts available on both sides of the litigation, who had prepared for and fought a substantial part of the *Cambridgeshire* action for Cansulex (among others) on one side and the relevant owners on the other, would contribute to efficiency, expedition and economy—and he could have added, in my opinion, both to assisting the court to reach a just resolution, and to promoting a possibility of settlement, in the present case. This is not simply a matter, as Oliver L.J. suggested, of financial advantage to the shipowners; it is a matter which can, and should, properly be taken into account, in a case of this kind, in the objective interests of justice.

For these reasons alone, I am of the opinion that this is a classic example of a case where the appellate court has simply formed a different view of the weight to be given to the various factors, and that this was not, therefore, an appropriate case for interfering with the exercise of the judge's discretion. But, in addition, there are two other factors which the judge could, but did not, take into account, in support of the conclusion which he in fact reached. First, he was, in my judgment, entitled to take into account, in assessing the *Cambridgeshire* factor, the fact that, although the owners in the two cases were different, the solicitors for the owners were in both cases instructed by the same insurers; and he was also entitled to take into account that the insurers of the shipowners in the present case are managed in England. Usually this is a matter of no concern in English litigation; because, in subrogation claims, the action is in this country (unlike other countries) brought in the name of the assured, and the rights being enforced are the rights of the assured. But in the case of an application such as that in the present case, it is shutting one's eyes to reality to ignore the fact that it is the insurers who are financing the litigation and are dominus litis; and this is, in my view, a relevant factor to be taken into account: see the *Société du Gaz* case, 1926 S.C.(H.L.) 13, 20, *per* Lord Sumner. Second, it was a relevant factor that this litigation was being fought under a contract of which the putative governing law was English law, and that this was by no means an insignificant factor in the present case, since there was not only a dispute as to the effect of the bill of lading contract (as to which, as I have already recorded, there appears to be some difference of opinion between English and Canadian judges), but also, it appears, as to the nature of the obligations under the contract in respect of what is usually called dangerous cargo. However, had the judge taken these matters into account, they would only have reinforced the conclusion which he in fact reached.

(10) *The effect of the time bar in British Columbia*

On the view of the case which I have formed, it is not strictly necessary to consider the effect of the time bar in British Columbia; but, since the point has been fully argued before us, I propose briefly to express my views upon it.

First, I cannot think that the fact (if it be the case) that the shipowners' claim was not time barred if brought in the Federal Courts

of Canada in provinces other than British Columbia—one suggestion was the Federal Court sitting in the neighbouring Province of Alberta—was of any relevance. On this, I accept the submission of the shipowners that it cannot be in the interests of the parties or in the interests of justice that the action should effectively be remitted to a forum which cannot be described as appropriate for the trial of the action.

Second, I do not think that the discretionary power which is, I understand, vested in the courts of British Columbia to waive the time bar, is relevant in this case. The point is simply that the shipowners' claim is not time barred in England but may be treated as time barred in British Columbia. In these circumstances, the question inevitably arises whether the English court, if it were minded to set aside the leave to serve proceedings on Cansulex out of the jurisdiction, should do so on the condition that Cansulex should waive any right to rely on the time bar applicable in British Columbia.

So it is necessary to consider whether justice required the imposition of such a term. The evidence before the Court of Appeal showed that neither the shipowners nor their legal advisers were aware of the two-year limitation period applicable in British Columbia. Cansulex did not draw the matter to their attention in their affidavit evidence; the shipowners' solicitors simply stumbled upon it when investigating the availability of suitable lawyers in Vancouver. Next, although Cansulex had applied to the English court to set aside the proceedings in the *Cambridgeshire* action, they had not appealed from the judge's adverse decision on the point and the *Cambridgeshire* action had proceeded to trial. Furthermore, had the shipowners' solicitors considered the matter, experience would have indicated that, having regard to the law as generally understood to prevail before the decision of this House in the *Amin Rasheed* case [1984] A.C. 50, in which the speeches were delivered in July 1983, and to the prominence hitherto given to legitimate personal and juridical advantages in the English jurisdiction (see, in particular, the decisions of the Court of Appeal in *Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A.* [1984] 2 Lloyd's Rep. 98 and the *Ilyssia* case [1985] 1 Lloyd's Rep. 107), it was improbable that any different conclusion would be reached on an application to set aside the leave granted in the present case. In this connection, it is to be observed that the shipowners' cause of action against Cansulex in the present case must have accrued in November 1980 (when the loading of the cargo on board the *Spiliada* in Vancouver was completed) and so was prima facie time barred in British Columbia by November 1982, nine months before the decision of this House in the *Amin Rasheed* case. In my judgment, had the point arisen, I would have been minded to hold that, in all the circumstances of the case, the shipowners had acted reasonably in commencing proceedings in this country, and that they had not acted unreasonably in failing to commence proceedings in British Columbia before the expiry of the limitation period there. In these circumstances, had I agreed with the Court of Appeal that the judge erred in the exercise of his discretion, I would nevertheless only have set aside the proceedings, to enable proceedings to be brought in

British Columbia, on the condition that Cansulex should waive their right to rely on the time bar in British Columbia.

However, for the reasons I have given I would allow the appeal with costs here and below, and restore the order of Staughton J.

(11) *Postscript*

I feel that I cannot conclude without paying tribute to the writings of jurists which have assisted me in the preparation of this opinion. Although it may be invidious to do so, I wish to single out for special mention articles by Mr. Adrian Briggs in (1983) 3 Legal Studies 74 and in [1984] L.M.C.L.Q. 227, and the article by Miss Rhona Schuz in (1986) 35 I.C.L.Q. 374. They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding.

Appeal allowed with costs.

Solicitors: Holman Fenwick & Willan; Linklaters & Paines.

C. T. B.

[PRIVY COUNCIL]

ERLAND BLOMQUIST. . . . . APPELLANT

AND

ATTORNEY-GENERAL OF THE COMMONWEALTH OF DOMINICA . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (DOMINICA)]

1987 Feb. 11, 12; March 3

Lord Bridge of Harwich, Lord Templeman, Lord Griffiths, Lord Mackay of Clashfern and Lord Oliver of Aylmerton

West Indies—Dominica—Constitution—Fundamental rights and freedoms—Deprivation of property—Land compulsorily acquired without payment of compensation—Infringement of landowner's constitutional rights—Whether rate of interest on compensation awarded limited to rate prescribed by statute—Land Acquisition Ordinance (Laws of Dominica, 1963 rev., c. 170), s. 21—Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027), Sch. 1, ss. 6(1)(2), 16(1)(2), Sch. 2, para. 12

Section 6(1) of the Constitution of Dominica in Schedule 1 to the Commonwealth of Dominica Constitution Order 1978 provides:

> "No property . . . shall . . . be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time, of adequate compensation."

The Government of Dominica compulsorily acquired land in 1977 but failed to comply with the provisions for assessing compensation in the Land Acquisition Ordinance. The landowner, after unsuccessful attempts to obtain compliance with those provisions, applied to the High Court for redress, under section 16 of the Constitution,[1] for breach of his right under section 6 of the Constitution, to have adequate compensation paid within a reasonable time. The judge made a declaration that the compulsory acquisition had not been carried out in accordance with the Ordinance and assessed compensation under the Ordinance at £250,000. Although the Ordinance pre-dated the Constitution and, therefore, by paragraph 12 of Schedule 2 to the Order of 1978, it was unaffected by the provisions of the Constitution, the judge in awarding interest considered that section 21 of the Ordinance,[2] which limited interest awarded to 6 per cent. simple interest, was only mandatory if the compensation on acquiring property was paid within a reasonable time and to restrict the rate of interest payable to the landowner in accordance with section 21 would in the circumstances conflict with section 6(1) of the Constitution. He awarded compound interest at the rate of 10 per cent. per

[1] Commonwealth of Dominica Constitution Order 1978, Sch. 1, s. 16: see post, pp. 496F—497A.
Sch. 2, para. 12: see post, p. 497A–B.
[2] Land Acquisition Ordinance, s. 21: see post, p. 498D.

annum. The Attorney-General appealed, inter alia, against the rate of interest. The Court of Appeal reduced the rate to simple interest at 6 per cent. as specified in the Ordinance.

On the landowner's appeal to the Judicial Committee:—

Held, dismissing the appeal, that, although it was conceded that the landowner was entitled to apply to the High Court pursuant to section 16 of the Constitution, section 6 prevented compulsory acquisition except where provision was made by law for compensation to be paid within a reasonable time; that the Ordinance made such provision and, being in existence at the date of the Constitution, it was a "law applicable" within the meaning of the section and it remained a law applicable notwithstanding that its statutory timetable for assessing compensation had not been complied with; and that, although the landowner was entitled to redress under section 16(1) of the Constitution, the court's power to redress the grievance was limited by section 16(2) to making such orders as would ensure that the acquisition was made in accordance with the Ordinance and, therefore, the landowner was only entitled to an award of simple interest at 6 per cent. per annum (post, pp. 499B–E, G—500A, D–E).

Decision of the Court of Appeal of the Eastern Caribbean Supreme Court (Dominica) affirmed.

The following case is referred to in the judgment of their Lordships:

Grand Anse Estates Ltd. v. De Gale (unreported), 7 October 1977; Court of Appeal of Grenada (Civil Appeal No. 3 of 1976)

The following additional cases were cited in argument:

Jaundoo v. Attorney-General of Guyana [1971] A.C. 972; [1971] 3 W.L.R. 13, P.C.

Maharaj v. Attorney-General of Trinidad and Tobago (No. 2) [1979] A.C. 385; [1978] 2 W.L.R. 902; [1978] 2 All E.R. 670, P.C.

APPEAL (No. 58 of 1985) by the appellant landowner, Erland Blomquist, with special leave from the judgment of the Court of Appeal of the Eastern Caribbean Supreme Court (Dominica) (Robotham C.J., Bishop J.A. and Berridge A.J.A.) given on 15 June 1984 allowing in part an appeal by the Attorney-General of the Commonwealth of Dominica from the order of Satrohan Singh J. in the High Court of Dominica on 9 May 1983 and substituting for the 10 per cent. compound interest per annum awarded simple interest at the rate of 6 per cent. per annum. The landowner's cross-appeal against the amount of compensation awarded was dismissed.

The facts are stated in the judgment of their Lordships.

Stuart McKinnon Q.C. and *Mark Strachan* for the landowner. The issue is whether interest on compensation ordered to be paid to the landowner by a judge of the High Court must be limited to simple interest at the rate of 6 per cent. per annum prescribed by section 21 of the Land Acquisition Ordinance.

The judge found that the landowner was entitled to apply to the High Court for redress under section 16 of the Constitution since his

A constitutional rights had been infringed; that the compulsory acquisition was not carried out in accordance with the provisions of the Ordinance; and that the landowner was not responsible for the delay between the compulsory acquisition on 4 November 1971 and the application to the High Court for redress under section 16 on 18 January 1983. In the circumstances the judge was entitled to award compound interest at the rate of 10 per cent. per annum and he was not bound to restrict it to B simple interest at 6 per cent. per annum in accordance with the Ordinance. [Reference was made to the relevant provisions of the Constitution and the Ordinance.] The Supreme Court (Constitutional Redress—Dominica) Rules 1968, made by the Chief Justice in the exercise of the powers conferred upon him by sections 16(6) and 96(4) of the Constitution of Dominica 1967 have not been revoked and so C pursuant to rule 9 the judge appointed a referee to assess the compensation payable to the landowner. However by agreement the parties invited the judge to make the assessment and he did so.

The government failed to comply with the Ordinance in the following respects: (1) the declaration required by section 3 that the landowner's land was to be acquired for public purposes and the notice served on him in connection therewith incorrectly stated the amount of land D acquired, and although the notice referred to a plan there was no indication of where or when the plan could be inspected; (2) the procedure for assessing compensation was not conducted with that degree of urgency which was required both explicitly and implicitly by the Ordinance; and (3) the authorised officer entered into no negotiations, and such offers as he made to purchase the land were unreasonable and E were in sums unrealistically low and significantly less than the compensation awarded by the judge.

From 1971 to 1983 the landowner unsuccessfully tried to obtain compensation, and in January 1983 he sought redress under section 16 of the Constitution. The powers of the High Court under section 16 are very wide. It can give redress for the infringement of a person's rights under section 6 despite the provisions of section 6 itself. By section 6(1) F a constitutional right is conferred not to be deprived of property except where provision is made by a law applicable to that compulsory taking of possession for the payment within a reasonable time of adequate compensation. Section 6(2) provides a constitutional remedy not limited to cases in which there has been an infringement of constitutional rights under section 6(1). A person whose right under section 6(1) has been G infringed can apply to the High Court under section 6(2) or section 16. If the latter is chosen the court has wide powers in giving redress, including power to award compensation, whereas under section 6(2) the court's powers are limited as set out in subsection (2)(*a*)–(*d*). If there is a combined application under sections 6 and 16 the court can give full redress.

The judge found that there was an infringement of the landowner's H fundamental right under section 6(1) by the Ordinance being so contravened by the government's failure to comply with its requirements that there was no law applicable to the acquisition of the land. Since the Ordinance was not applicable to the acquisition the Ordinance did not

relate to it, and so the judge was at liberty to award whatever rate of interest he considered adequate to compensate the landowner. Under section 16 the court has wide powers to award proper compensation for an infringement of section 6(1), and with regard to the appropriate rate of interest the judge is not limited by section 21 of the Ordinance.

The word "redress" in section 16 has a wide meaning and includes power to award compensation. Reliance is placed upon *Jaundoo v. Attorney-General of Guyana* [1971] A.C. 972 and *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)* [1979] A.C. 385.

The judge had power to award compound interest at the rate of 10 per cent. per annum and there were proper grounds for him making such an award.

George Newman Q.C. and *James Guthrie* for the Attorney-General. The initial question is what is the nature of the constitutional right protected by section 6? It is a misunderstanding of section 6 to construe it as a section which gives a right to an individual to adequate compensation payable in a reasonable time, and that mistake was made by the judge. The constitutional right given by this Constitution is to the protection of a law. That is what is being referred to in section 1. Chapter 1 of the Constitution relates to the protection of fundamental rights and freedoms, and, unlike section 4(*a*) of the Constitution of Trinidad and Tobago (in the Schedule to the Constitution of the Republic of Trinidad and Tobago Act 1976 (No. 4 of 1976)), there is no declaration that such fundamental human rights and freedoms have existed and should continue to exist. Accordingly, there is no assumption in the Constitution of Dominica 1978 that there are in existence laws protecting the fundamental rights and freedoms. Section 1(*c*) provides that every person in Dominica is entitled to protection from deprivation of property without compensation, and section 6(1) gives that protection. Properly construed the right afforded by section 6(1) is a right of the individual not to be deprived compulsorily of his own property unless there is an applicable law which itself contains provision for the payment of adequate compensation within a reasonable time. That constitutional right includes the right to have property taken only in accordance with the applicable law; and, if it is not, the remedy is to ensure that the property is so taken.

In *Jaundoo v. Attorney-General of Guyana* [1971] A.C. 972 there was no law in existence in Guyana under which the compulsory acquisition could properly take place. In the present case there is a law applicable to the acquisition of the landowner's land, namely the Land Acquisition Ordinance.

If the law applicable to a compulsory acquisition has not been complied with, section 6(2)(*c*) applies and the High Court must determine compensation in accordance with the applicable law. Sections 6(2) and 16 give the individual who is faced with an infringement of his constitutional right the right to apply immediately to the High Court. Where there has been long delay after the acquisition without the payment of compensation, that can constitute an infringement of the constitutional right under section 6(1), but one does not then introduce in order to compensate for that infringement something which goes

A outside the applicable law, which itself provides for the payment of interest in the event of delay. The redress which can be given under section 16 must be in conformity with the applicable law.

A provision which requires the existence of a law would be arid unless compliance with that law is also part of the constitutional right, and such compliance is an implicit part of the constitutional rights created in section 6. The Constitution affords protection of fundamental B rights and freedoms by securing their enforcement. The remedy provided by the Constitution for the government's failure to comply with the law applicable to the acquisition is that laid down in section 6(2). By that subsection a person whose property has been compulsorily acquired has a right of direct access to the High Court. If there has been inordinate delay in the payment of compensation the court can determine under C section 6(2)(*b*) whether the acquisition was carried out in accordance with the law authorising the taking of possession, and if not under section 6(2)(*c*) the court can determine what compensation the individual is entitled to under the applicable law. Thus the remedy available under the Constitution for unreasonable delay in the payment of compensation is a right to claim relief from the High Court, which can award compensation and interest; but it is not entitled to go outside the terms D of the applicable law.

Section 16(1) entitles a person to apply to the High Court if his constitutional right under section 6(1) has been infringed. The jurisdiction of the court upon such an application is that stated in section 16(2)(*a*), which takes one back to section 6 because it gives the court power to make such declarations and orders it considers appropriate for enforcing E or securing the enforcement of the provisions of section 6.

The Constitution does not envisage that if there has been unreasonable delay the government will have to pay greater compensation than it would have to under the Ordinance, which is the law which otherwise would be applicable to the acquisition. Although it is conceded that there has been delay, that was to some extent due to the landowner's failure to take advantage of the remedy available to him under the F Constitution and to apply to the High Court earlier. The remedy given to an individual faced with delay is to apply to the High Court for it to assess compensation in accordance with the Ordinance. In relation to interest the court has no power to go beyond the limits in section 21 of the Ordinance. In giving redress under section 16 of the Constitution the court cannot ignore the applicable law. There is no advantage to the G landowner in the word "redress" in section 16, because that redress must be for the purpose of enforcing or securing the enforcement of the provisions of section 6.

The landowner contends that there is a constitutional right to receive interest at large in a case where there has been long delay. However the Constitution only states that there must be in existence a law which provides for the payment of adequate compensation for compulsory H acquisition. If that law is not complied with the landowner can require the High Court to exercise the powers which are contained in the applicable law, but the court cannot exercise wider powers. If the appeal is allowed it would mean that the court would be entitled under section

16 to award greater compensation than that payable under the Ordinance and not merely higher interest.

The judge followed *Grand Anse Estates Ltd. v. De Gale* (unreported), 7 October 1977; Court of Appeal of Grenada (Civil Appeal No. 3 of 1976), but that case can be distinguished because the relevant provisions of the Constitution of Grenada (Grenada Constitution Order 1973 (S.I. 1973 No. 2155)) are different from those of the Constitution of Dominica 1978.

Paragraph 12 of Schedule 2 of the Commonwealth of Dominica Constitution Order 1978 ensures that the Land Acquisition Ordinance is not affected by section 6 of the Constitution. The Constitution therefore acknowledges that there is in existence a law which is constitutional and meets the requirements of section 6(1). The essence of the Constitution is that it gives a right to have compensation assessed and paid in accordance with the Ordinance, and so the judge must comply with that applicable law in exercising his powers to grant redress under section 16.

McKinnon Q.C. in reply. On behalf of the landowner the following propositions are made: (1) There has been an infringement of the landowner's fundamental right under section 6(1) of the Constitution. (2) Where there is such an infringement the landowner has two quite separate options open to him, and he can apply to the High Court under section 6(2) or under section 16. Those two sections are quite distinct and section 16 cannot be construed by reference to section 6(2) because section 16 cannot be used to enforce the provisions of section 6(2) but only those of section 6(1).

With regard to the first proposition, the Attorney-General accepts that there has been an infringement of the landowner's fundamental right under section 6(1). The infringement was by the Ordinance being sufficiently or so flagrantly contravened that there was in reality no law applicable to the acquisition of his land. The government was not merely guilty of delay in paying compensation, but also failed to comply with other requirements of the Ordinance. Section 6(1) sets out the constitutional right. Section 6(2) applies to any case whether or not there has been an infringement of fundamental rights under subsection (1).

With regard to the second proposition, the Attorney-General accepts that the words "law applicable" in section 6(1) mean that the law has to be properly applied, because otherwise there would have been no infringement of the landowner's constitutional right. Paragraph 12 of Schedule 2 is irrelevant since there is no law applicable to the acquisition if the Ordinance is not properly applied. Paragraph 12 prevents an attack upon the Ordinance and it cannot be suggested that an assessment of compensation in accordance with the Ordinance could be unconstitutional in that it did not provide adequate compensation. If "law applicable" means simply that there must be a law in force which applies generally to compulsory acquisitions and covers this acquisition, if complied with there would not have been an infringement of the landowner's constitutional right under section 6(1), but the courts below have found that there was such an infringement and so for there to be a law applicable to an acquisition it has to be properly applied.

There having been an infringement of the landowner's right under section 6(1), he was entitled to apply to the court for redress under section 16. The court then had jurisdiction to make any order for the purpose of enforcing or securing the enforcement of section 6(1) and its powers were not limited by the terms of section 6(2). The court can order under section 16 whatever compensation and interest it considers adequate.

Cur. adv. vult.

3 March. The judgment of their Lordships was delivered by Lord Mackay of Clashfern.

The appellant ("the landowner") was on 4 November 1971 owner of an area of land in Dominica. On that date it was acquired by the Government of Dominica ("the government"). On 18 January 1983, since no compensation had by then been paid, the landowner applied to the High Court for various orders. The application was opposed by the Attorney-General of the Commonwealth of Dominica. On 19 April 1983 Satrohan Singh J. made an order declaring that the compulsory acquisition was not carried out in accordance with the provisions of the Land Acquisition Ordinance (c.170) ("the Ordinance") and appointed a referee to assess the compensation payable to the landowner on the acquisition. After further procedure it was agreed that the court itself should assess the compensation and on 9 May 1983 the same judge assessed the compensation at $250,000 and awarded compound interest at the rate of 10 per cent. per annum on the assessed compensation from the date of acquisition to the date of payment. He also awarded the costs of the application to the landowner.

The Attorney-General appealed to the Court of Appeal of the Eastern Caribbean Supreme Court (Dominica) and the landowner cross-appealed. By a judgment dated 15 June 1984 the Court of Appeal (Robotham C.J., Bishop J.A. and Berridge A.J.A.) allowed the appeal by the Attorney-General only in so far as it related to interest and dismissed the landowner's cross-appeal. By order dated 22 May 1985 the landowner was granted special leave to appeal to the Judicial Committee of the Privy Council.

The only question which was argued at the hearing before their Lordships was that of the appropriate award of interest. The landowner maintained that the judge's original award was correct whereas the Attorney-General maintained that the Court of Appeal had rightly reduced the award of interest to simple interest at 6 per cent. from the date of acquisition to the date of payment in accordance with section 21 of the Ordinance.

The present Constitution of Dominica is contained in Schedule 1 to the Commonwealth of Dominica Constitution Order 1978 which came into operation on 3 November 1978. Section 1 in Chapter 1 of the Constitution provides:

> "Whereas every person in Dominica is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject

to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely . . . (*c*) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

The relevant provision dealing with the protection from deprivation of property without compensation is section 6 which so far as relevant is:

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time, of adequate compensation. (2) Every person having an interest in or right over property that is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—(*a*) determining the nature and extent of that interest or right; (*b*) determining whether that taking of possession or acquisition was duly carried out in accordance with a law authorising the taking of possession or acquisition; (*c*) determining what compensation he is entitled to under the law applicable to that taking of possession or acquisition; (*d*) obtaining that compensation: Provided that if Parliament so provides in relation to any matter referred to in paragraph (*a*) or (*c*) of this subsection the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter."

There follows a provision empowering the Chief Justice to make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction conferred on the High Court by section 6(2) but no rules have been made under this power. Section 16 of the Constitution provides:

"(1) If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him . . . then, without prejudice to any other action with respect to the same matter which is lawfully available, that person . . . may apply to the High Court for redress. (2) The High Court shall have original jurisdiction—(*a*) to hear and determine any application made by any person in pursuance of subsection (1) of this section; . . . and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the

A enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution: Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

Paragraph 12 of Schedule 2 to the Order enacting the Constitution B provides: "Nothing in section 6 of the Constitution shall affect the operation of any law in force immediately before 1 March 1967 . . ." 1 March 1967 was the date on which the previous Constitution repealed by this Constitution had come into force. Section 6(1) of the 1967 Constitution is in the same terms as section 6(1) of the 1978 Constitution. Section 6(8) of the 1967 Constitution provides: "Nothing in this section shall affect the operation of any law in force immediately before the C coming into operation of this Constitution . . ." Amongst the laws in force on 1 March 1967 was the Ordinance which was originally enacted on 3 June 1946. In view of the provisions in the Constitutions to which their Lordships have referred nothing in section 6 of either Constitution affects the operation of the Ordinance.

Section 3 of the Ordinance provides that if the Administrator in D Council considers that any land should be acquired for a public purpose he may cause a declaration to that effect to be made in the manner provided by section 3 and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose. Section 3(2) provides that the declaration should specify among other things "the approximate area" of the land and "in cases where a plan has been prepared, the place where, and the time when, a plan of the land can be E inspected." Section 7 of the Ordinance requires that after land has been compulsorily acquired a notice of acquisition containing, inter alia, the said particulars should be served on every person known or believed to be entitled to compensation in respect of the acquisition. The declaration that the landowner's land was to be acquired for a public purpose and the notice served on the landowner in connection therewith referred to F 86.37 acres of land having been acquired, whereas the true amount of land acquired was 98 acres. Further, although the notice of acquisition referred to a plan, there was no indication of where or when the plan could be inspected.

By section 6(1) of the Ordinance:

> "As soon as any declaration has been published . . . the authorised G officer shall, without delay, enter into negotiations . . . for the purchase of the land to which the declaration relates upon reasonable terms and conditions, and by voluntary agreement with the owner of the land."

The affidavit evidence of the landowner, which was not challenged as to the facts therein, disclosed that between the date of acquisition and January 1973 the landowner made many unsuccessful attempts to have H proper negotiations with the authorised officer to determine compensation to be paid to him. Section 12(1) provided that: "As soon as it becomes necessary to do so the Administrator shall cause a board of assessment . . . to be appointed." Between January 1973 and August 1975 the

landowner frequently requested in writing that his claim for compensation be submitted to arbitration. It was not until August 1975 that a board of assessment was appointed. Section 13(1) of the Ordinance required that: "Upon the appointment of a board . . . the authorised officer shall forward to the chairman . . . (*f*) a copy of the report required by this section." In the report the authorised officer was required to give his opinion, inter alia, upon the value of the land for the purposes of compensation under the Ordinance. The authorised officer's report was not prepared until 23 December 1977. In December 1977 when the board of assessment had not begun its deliberations the landowner's nominee on the board wrote to the government drawing attention to the fact that the matter had been long outstanding and suggesting the appointment of another chairman. The board of assessment duly began its deliberations but they were never concluded. In September 1982 the landowner was requested to appoint a nominee to another board of assessment which was to be set up shortly thereafter, but the landowner decided to institute the proceedings out of which this appeal arises. No board of assessment made any determination nor award of compensation.

Section 21 of the Ordinance provides:

> "The board, in awarding compensation, may add thereto interest at the rate of 6 per cent. per annum, calculated from the date upon which the authorised officer entered into possession of the land acquired until the date of the payment of the compensation awarded by the board."

Before the judge the landowner relied upon a decision of the Court of Appeal of Grenada in *Grand Anse Estates Ltd. v. De Gale* (unreported), 7 October 1977 (Civil Appeal No. 3 of 1976) in which St. Bernard J.A. expressed the opinion that the interest payable must be at a rate applicable to give the expropriated owner a just equivalent of his loss at the time of the expropriation and not a rigid and fixed rate whatever his loss might be and that in spite of the terms of section 19 of the Land Acquisition Ordinance (Laws of Grenada, c.153), the applicable legislation in Grenada, a landowner was entitled to interest at such rate that would compensate him for any loss occasioned to him from the date of the acquisition. The judge, having found that section 21 of the Dominica Ordinance was only binding or mandatory if the compensation for the acquired property was being paid within a reasonable time, concluded that since the landowner was not compensated for this compulsory acquisition within a reasonable time to restrict the interest to 6 per cent. per annum simple interest would be repugnant to and in conflict with the provisions of section 6(1) of the Constitution requiring adequate compensation to be given. He accordingly awarded compound interest at the rate of 10 per cent.

The Court of Appeal took the view that by awarding 10 per cent. compound interest the judge had gone outside the scope of the Ordinance and for that reason substituted for the judge's award of interest, simple interest at 6 per cent. allowed by the Ordinance.

In support of the submission that the judge's order with regard to interest should be restored, counsel for the landowner submitted that

A the judge was not bound by section 21 of the Ordinance but was entitled by virtue of the powers conferred upon him by section 16 of the Constitution of 1978 to grant redress to the landowner for the infringement of the landowner's fundamental right under section 6 of the Constitution. Where such an infringement exists, the landowner submitted he was entitled to the remedies provided under section 6(2) of the Constitution but was not restricted to these since section 16, B and the power conferred by it upon the High Court to give redress, was available for use in appropriate circumstances to provide remedies over and above those specifically mentioned in section 6(2).

Counsel for the Attorney-General did not dispute that the landowner was entitled to apply to the High Court pursuant to section 16 of the Constitution and that the High Court was entitled to find that the C compulsory acquisition of the land was not in accordance with the Ordinance. He went on to submit that the protection from deprivation of property without compensation provided by the Constitution of Dominica in accordance with section 1 was that afforded by section 6; that section 6 prevented compulsory acquisition except where provision is made by a law applicable to that acquisition for the payment within a reasonable time of adequate compensation; that the Ordinance was a law applicable to this D acquisition providing for the payment within a reasonable time of adequate compensation; and that accordingly the only right which the Constitution gave the landowner in the circumstances was that the acquisition should be duly carried out in accordance with the Ordinance and that accordingly, the landowner's only remedy for delay in payment was interest in accordance with the provisions of section 21 of the Ordinance.

E Their Lordships consider that the submission for the Attorney-General is right. The decision of the Court of Appeal of Grenada in the *Grand Anse* case was given in accordance with the Constitution of Grenada (Grenada Constitution Order 1973 (S.I. 1973 No. 2155)) which provided that an existing law was to be construed from the commencement of the Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the F Constitution. There was no provision to the same effect as section 6(8) of the 1967 Constitution of Dominica nor paragraph 12 of Schedule 2 to the 1978 Constitution of Dominica. The Court of Appeal of Grenada were accordingly bound to give effect to a constitutional provision which had the effect of overriding any provision in an existing law which called for something less than full compensation.

G Since the operation of the Ordinance in Dominica is not to be affected by the constitutional provisions protecting the people of Dominica from deprivation of property without compensation the approach taken in Grenada is not open in Dominica. Where, as in this case, there was a law in existence in Dominica at the date of the acquisition of the land which authorised its acquisition there was in their Lordships' opinion a law *applicable* to that acquisition within the H meaning of section 6 of the Constitution. It did not cease to be applicable to the acquisition when the timetable implied in its provisions for the assessment of compensation was not promptly carried out. This delay however did have the effect that the acquisition was not duly

carried out in accordance with the law authorising the acquisition. There was accordingly a breach of the landowner's constitutional right conferred by section 6 entitling him to the determination which he obtained from the judge that the acquisition had not been duly carried out in accordance with the Ordinance and entitling him to the remedy conferred by section 16 of redress.

In their Lordships' view redress in section 16 does not have the wide meaning contended for by counsel for the landowner. That meaning if applied would empower the High Court not only to award interest on a different basis from that specified in the applicable law but would put the question of the compensation for the acquisition also at large unrestricted by the provisions of the applicable law. In their Lordships' opinion the word "redress" in section 16(1) is used to introduce the specific powers described in section 16(2), namely to

> "make such declarations and orders, issue such writs and give such directions as [the High Court] may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution."

When this more detailed provision is applied to the circumstances of the present case it empowers the court to take such steps as it may consider appropriate for the purpose of enforcing or securing the enforcement of the provision of section 6. The acquiring authority, in this case the government, is bound to carry out the acquisition in accordance with the provisions of the Ordinance. In this case since no compensation had been assessed at the date of application to the High Court this involved taking the steps necessary to secure that compensation was assessed and awarded on the basis appropriate to the Ordinance.

There is nothing in section 16 properly construed which, in their Lordships' opinion, would entitle the court to make an award of damages, in the form of increased interest or otherwise, in respect of infringements of the landowner's constitutional rights under section 6 which consisted in delay in the assessment and payment of compensation in accordance with the Ordinance where no tort, breach of contract or other cause of action giving right to damages existed. This conclusion is strongly supported by the terms of section 6(2)(*c*) which provide that the access to the High Court under that subsection is for determining what compensation the landowner is entitled to under the law applicable to that acquisition. On the landowner's argument in the present case as has already been pointed out section 16 would entitle the court to use a different basis altogether. It cannot have been the intention of the legislature in framing the Constitution that entirely different bases of assessment of compensation would be available according to whether section 6(2)(*c*) or section 16(1) was being used as the basis for the intervention of the High Court. Even if the interest to be awarded on compensation is regarded as something distinct from the compensation itself there is nothing in section 16 which confers power upon the court to award interest other than that provided by section 21 of the Ordinance and no other power of the High Court was founded upon in argument

which would entitle the court to make any other order with respect to interest.

The Attorney-General did not seek an order against the landowner for costs of the hearing before this Board and accordingly their Lordships dismiss this appeal and affirm the order of the Court of Appeal of Dominica of 15 June 1984.

Solicitors: David Layard Horsfall; Charles Russell & Co.

S. S.

[PRIVY COUNCIL]

ATTORNEY-GENERAL OF HONG KONG . . . APPELLANT

AND

WONG MUK PING . . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1987 Jan. 21; Feb. 19

Lord Hailsham of St. Marylebone L.C., Lord Bridge of Harwich, Lord Templeman, Lord Griffiths and Lord Ackner

Crime—Evidence—Corroboration—Accomplice—Warning to jury of danger of convicting on uncorroborated testimony of accomplices—Jury directed to reject accomplice evidence if not credible—Jury not directed to decide whether accomplice evidence credible before considering corroborative evidence—Whether misdirection

Hong Kong—Crime—Evidence—Accomplice's evidence—Direction to jury on corroborative evidence

The defendant was charged with conspiracy to traffic in dangerous drugs in relation, inter alia, to the importation of opium into Hong Kong on a particular night. The prosecution case was that the defendant had attended a meeting at which the importation was planned and had supervised the transfer of the opium from a fishing vessel to a van, which he had then followed in order to ascertain its safe arrival at a warehouse. The police stopped the van containing the opium, and they also stopped the car driven by the defendant with two of the fishermen as passengers. The prosecution relied on the evidence of accomplices and the defendant's confession statement, which the judge admitted as a voluntary confession. The defendant gave no evidence before the jury. In his summing up the judge warned the jury of the danger of convicting on the uncorroborated evidence of accomplices and he explained the meaning of corroboration. He directed them that they could convict on the uncorroborated testimony of accomplices if having regard to his

warning they were satisfied beyond reasonable doubt that the accomplices' evidence was true, but he pointed out its unreliability. The defendant was convicted and appealed on the ground, inter alia, that the judge had erred in failing to direct the jury that the evidence of an accomplice had to be credible before any question of corroboration could arise. The Court of Appeal allowed the defendant's appeal against conviction on that ground.

On the Attorney-General's appeal to the Judicial Committee:—

Held, allowing the appeal, that a trial judge, when giving directions with regard to corroboration of the evidence of accomplices and other suspect witnesses in order that the credibility of such evidence could be assessed having regard to all the evidence in the case, should not direct the jury to first consider the suspect witness's evidence on its own to determine that it was credible before considering whether there was any other evidence capable of providing corroboration; that the directions given to the jury not only made them fully aware that to be relied on the accomplices' evidence had to be credible, but encouraged them to find that it was so unsatisfactory that they must reject it, and the overwhelming probability was that the jury had convicted the defendant on the basis of his confession and the undisputed facts; and that, accordingly, the jury had been properly directed and the conviction should be restored (post, pp. 508F–H, 509A–D, 511D–G).

Dicta of Lord Hailsham of St. Marylebone L.C. and Lord Reid in *Reg. v. Kilbourne* [1973] A.C. 729, 746, 750, H.L.(E.) applied.

Observation of Lord Morris of Borth-y-Gest in *Reg. v. Hester* [1973] A.C. 296, 315, H.L.(E.) considered.

Decision of the Court of Appeal of Hong Kong reversed.

The following cases are referred to in the judgment of their Lordships:

Reg. v. Boardman [1975] A.C. 421; [1974] 3 W.L.R. 673; [1974] 3 All E.R. 887, H.L.(E.)

Reg. v. Hester [1973] A.C. 296; [1972] 3 W.L.R. 910; [1972] 3 All E.R. 1056; 57 Cr.App.R. 212, H.L.(E.)

Reg. v. Kilbourne [1973] A.C. 729; [1973] 2 W.L.R. 254; [1973] 1 All E.R. 440, H.L.(E.)

Reg. v. Turner (Bryan) (1975) 61 Cr.App.R. 67, C.A.

The following additional cases were cited in argument:

Reg. v. Spencer [1987] A.C. 128; [1986] 3 W.L.R. 348; [1986] 2 All E.R. 928, H.L.(E.)

Yu Yuk-kwong v. The Queen [1979] H.K.L.R. 585

Appeal (No. 16 of 1986) by the Attorney-General of Hong Kong, with special leave, from the judgment of the Court of Appeal of Hong Kong (Huggins V.-P., Li and Yang JJ.A.) given on 18 October 1984 allowing the appeal of the defendant, Wong Muk Ping, and quashing his conviction on 14 February 1984 in the High Court (Criminal Jurisdiction) before Deputy Judge O'Dea and a jury on count 9 of an indictment charging the defendant and others with conspiracy to traffic in dangerous drugs contrary to common law.

A The facts are stated in the judgment of their Lordships.

Anthony Hidden Q.C., F. C. Whitehouse, Assistant Crown Prosecutor, Hong Kong, and *Timothy Straker* for the Attorney-General of Hong Kong. The question is what is and what is not a proper direction to a jury in relation to accomplice evidence.

B The judge's direction with regard to the accomplice evidence was impeccable. The jury could have convicted the defendant by being so satisfied by the accomplice evidence that they regarded it as sufficient even without corroboration; or they could have found the accomplice evidence intrinsically credible and then have looked for corroboration finding it in the defendant's confession statement; or they could have placed no reliance on the accomplice evidence but have believed and C relied upon the confession statement.

The approach of the Court of Appeal was wrong. The Court of Appeal allowed the defendant's appeal on the ground that the judge erred in failing to direct the jury that the evidence of an accomplice must be credible before any question of corroboration can arise, and in delivering the judgment Huggins V.-P. merely mentioned *Reg. v. Hester* D [1973] A.C. 296 without citing any proposition from that authority, or referring to any other authorities. The Court of Appeal did not consider a further ground, namely that the verdict was unsafe and unsatisfactory, and so if the appeal is allowed the Board should remit the case to the Court of Appeal to consider that matter.

In his summing up the judge took great care to warn the jury what E the approach to accomplice evidence should be and in particular to these accomplices. He warned the jury of the danger of convicting on the uncorroborated evidence of accomplices, and gave proper directions as to what amounted to corroboration. He told the jury that they could convict on the uncorroborated evidence of accomplices if they were satisfied beyond reasonable doubt that it was true, but he pointed out the unreliability of the accomplice evidence and said that it was for them F to decide what, if any, weight was to be attached to it. He dealt separately with the confession statement, the admissibility of which is no longer challenged by the defendant. The judge did not tell the jury that the confession was capable of corroborating the accomplice evidence, but that was being too favourable to the defendant and caused him no prejudice. [Reference was made to *Reg. v. Hester* [1973] A.C. 296; *Reg.* G *v. Kilbourne* [1973] A.C. 729; *Reg. v. Boardman* [1975] A.C. 421; *Reg. v. Turner (Bryan)* (1975) 61 Cr.App.R. 67 and *Reg. v. Spencer* [1987] A.C. 128.]

There is no set formula which a judge must apply in directing the jury on the approach to accomplice evidence. The words used by the trial judge were eminently appropriate. There was ample basis for the defendant's conviction with or without the evidence of any H accomplice, and the decision of the Court of Appeal was incorrect.

Richard Du Cann Q.C. and *David Whitehouse* for the defendant. It is accepted that there is no set formula which has to be applied in giving directions in relation to the evidence of accomplices.

Although the Court of Appeal did not refer to *Reg. v. Boardman* [1975] A.C. 421 or *Reg. v. Kilbourne* [1973] A.C. 729 it did so in associated appeals arising from these trials. In *Yu Yuk-kwong v. The Queen* [1979] H.K.L.R. 585 the Court of Appeal considered in detail *Reg. v. Hester* [1973] A.C. 296 and *Reg. v. Kilbourne* [1973] A.C. 729, and in that case the Court of Appeal held that the principal accomplice witness was not credible and his evidence could not be relied upon, and so the convictions were quashed. In giving judgment in the present case the Court of Appeal used a kind of shorthand, which should not be taken to reveal any failure on its part to understand and apply the principles set out in *Reg. v. Hester* and *Reg. v. Kilbourne*. The Court of Appeal was not saying that in every case the jury had to be warned that the accomplice evidence might be so bad that it fell of its own inanition and could not be corroborated, but only that in this case it was vital that such a warning should be given. That approach was correct, because in *Reg. v. Turner (Bryan)*, 61 Cr.App.R. 67, 84, James L.J. said that some cases might call for a more emphatic or elaborate direction than others. In *Reg. v. Kilbourne* [1973] A.C. 729, 746, Lord Hailsham of St. Marylebone L.C. said that if a witness's testimony fell of its own inanition it was not revived or resurrected by the presence of corroborative evidence.

The judge should direct the jury to the following effect:

> "Is the accomplice believable and worthy of credit? If you come to the conclusion that he is, then the law requires that you look for corroboration. If not, you do not need to look for corroboration and you must disregard that evidence completely and look at the remainder of the evidence to see whether you can reach the conclusion that you feel sure that the prosecution has proved its case and the accused is guilty."

If the jury comes to the conclusion at the outset that the evidence of an accomplice is not to be believed at all, they should reject it. However if they are doubtful about it they can look to see if it is supported by any other evidence. There is no conflict between what was said in *Reg. v. Kilbourne* [1973] A.C. 729 by Lord Hailsham of St. Marylebone L.C., at p. 746, and by Lord Reid, at p. 750.

The two stage approach need not be adopted in every case. It is unnecessary if the accomplice evidence cannot be corroborated, and then the jury only has to be given the warning and to be told that if they are so convinced that they feel sure they can convict on that uncorroborated evidence.

The factors which may have led the Court of Appeal to consider that it was vital for a two stage direction to be given may have been: (1) the trial was at the beginning of 1984 and 13 years after the events concerned; (2) the two principal witnesses relied on by the prosecution were fishermen who came from a very close community and who were subject to Chinese allegiances of which the Court of Appeal was well aware; (3) Those witnesses were both offered immunity from prosecution, and the Court of Appeal was particularly capable of knowing what effect that might have on witnesses of this nature; and (4) the Court of Appeal

would have in mind the background as revealed in *Yu Yuk-kwong v. The Queen* [1979] H.K.L.R. 583.

If the appeal succeeds the case should be remitted to the Court of Appeal. Although the outstanding ground of appeal may not raise any argument of substance there is also an appeal against sentence which the Court of Appeal has not yet considered.

Hidden Q.C. was not called upon to reply.

Cur. adv. vult.

19 February. The judgment of their Lordships was delivered by Lord Bridge of Harwich.

The proceedings

In November 1977 the defendant was committed for trial together with eight others on charges of conspiracy to traffic in dangerous drugs. The indictment contained nine counts alleging different conspiracies of which the defendant was concerned in three. When the matter came to trial in October 1978 the defendant and another defendant, named Wong Ping Fai, who had both been on bail, had absconded. Nothing more was heard of them until 28 September 1983 when, somewhat surprisingly, they presented themselves at the headquarters of the Hong Kong Police Narcotics Bureau accompanied by their solicitor. The two men were tried together before Deputy Judge O'Dea and a jury in January and February 1984. The defendant was acquitted on two counts, but convicted on the conspiracy which was the subject of the ninth count in the original indictment. His appeal against conviction was allowed by the Court of Appeal of Hong Kong (Huggins V.-P., Li and Yang JJ.A.) on 18 October 1984. The Attorney-General now appeals from that decision to Her Majesty in Council by special leave.

The undisputed facts

The case for the prosecution against the defendant on the ninth count related exclusively to an importation of opium on the night of 21/22 February 1971. In the early hours of 22 February a van carrying approximately 1.3 metric tonnes of opium was stopped by the police after a high speed chase at the Lion Rock Tunnel near Shatin. The opium had been landed at Shatin from a fishing vessel. Following some distance behind the van was a private car driven by the defendant and carrying two passengers who were in fact members of the crew of the fishing vessel which had landed the opium. This car was also stopped by the police and the three occupants were arrested. But they were later released for want of any evidence available to the police at that time to connect any of them with the opium importation. The defendant was not re-arrested until 25 August 1977. The facts so far recited were not in dispute.

The issues

What the prosecution set out to prove was that the defendant attended a meeting at which the opium importation was planned, was

present supervising the transfer of the opium from the fishing vessel to the van and that he was following the van with the intention of reporting in due course to the leader of the gang responsible for the drug importing operation that the consignment of opium had been safely delivered to the warehouse which was its intended destination. The defendant gave no evidence before the jury, but the case put on his behalf in cross-examination was, in effect, that he had no connection with the matter other than that he had, by coincidence, given a lift in his car to the two fishermen who were arrested with him when his car was stopped early on 22 February 1971. The disputed evidence falls for consideration under two headings.

The accomplice evidence

The Attorney-General had given immunity to three accomplices in the conspiracy, who were called as witnesses for the prosecution. These were Chan Man Hin and Wong Chin Kai, the two fishermen from the vessel which brought the cargo of opium to Shatin who were in the defendant's car when it was stopped in February 1971, and a third man named Leung Chan Yung. In the event only the evidence of Chan and Leung supported the prosecution case. The evidence of Wong Chin Kai, so far as it went, supported the defendant's defence.

The confession

The prosecution proposed to tender in evidence a written record signed by the defendant of what purported to be the defendant's answers to questions put to him under caution at an interview with police officers immediately following his arrest in August 1977. The admissibility of this was challenged. The case for the defence was that the incriminating answers did not record anything said by the defendant, but that he had been forced to sign the document without reading it. The police officers concerned and the defendant gave evidence on the voir dire. The judge admitted the document as a voluntary confession. This decision was unsuccessfully challenged in the Court of Appeal. As already indicated, the jury did not have before them any evidence from the defendant to contradict the police evidence relating to the circumstances in which the confession statement was made. The statement, on its face, amounted to an unequivocal, detailed and circumstantial admission of the part the defendant played in the opium importation in 1971.

The summing up

The trial judge had to give the jury directions about the way in which the jury should approach the evidence of accomplices with reference not only to the count of which the defendant was eventually convicted, but also to the two counts of which he was acquitted and a further count which concerned only the co-defendant, Wong Ping Fai, all of which the prosecution had sought to prove in reliance, in whole or in part, on accomplice evidence. These directions, so far as they went, were quite unexceptionable. The judge adequately warned the jury of the danger of convicting on the uncorroborated evidence of accomplices.

A He explained accurately and lucidly what was meant by corroboration and specifically pointed out that accomplices could not corroborate each other. He told the jury of their entitlement to convict on the uncorroborated evidence of accomplices if, with due regard to his warning, they were nevertheless satisfied beyond reasonable doubt that it was true.

B After reviewing the evidence relevant to other counts in the indictment the judge turned to the evidence against the defendant on the ninth count. Short of directing the jury as a matter of law to reject the accomplice evidence, which would have been an unjustified usurpation of the jury's function, the judge could hardly have gone further than he did in inviting the jury to share his own undisguised opinion that the accomplice evidence of Chan and Leung, in so far as it C tended to incriminate the defendant, was worthless. Their Lordships need only quote a few extracts from the summing up to demonstrate this. Of both witnesses the judge said: "you will, I am sure, exercise great caution in deciding whether to place any reliance on their evidence at all." Of part of Chan's evidence he said:

> "I personally regard his identification of the . . . defendant in the D dock as meaningless and I would strongly suggest that you disregard it completely."

After reading a substantial extract from Chan's incriminating evidence he said:

> "Well, members of the jury, that evidence, you may think, is so totally unreliable that it ought to be completely disregarded. That E course is open to you if you wish to adopt it."

Of Chan he finally said:

> "He has admitted to an act of armed piracy and his evidence, as I have indicated, is undermined with contradictions and numerous inconsistencies, but in the end it is for you to decide whether his F evidence has any value or not."

The judge described Leung as "a witness whom you may have felt was experiencing considerable difficulty in recalling these events which occurred so long ago." After reviewing the evidence of Leung he said:

> "when cross-examined, this witness became totally confused and admitted that there was a great deal he could not remember. Well, G on the basis of this admission and the conflicts which his evidence has had with other witnesses, you will have to decide what weight can be attached to this man's evidence . . ."

The judge at no point invited the jury to consider the evidence of the confession statement as corroborative of the evidence of the accomplices which tended to incriminate the defendant. He dealt with the confession H quite separately. He reminded the jury fully of the suggestions put in cross-examination as to how the statement had been taken, but forbore to point out that no evidence had been called by the defence to substantiate these suggestions. He concluded:

"When you do deliberate on where the truth lies, you must keep it uppermost in your mind that it is for the Crown to prove beyond reasonable doubt that the statement is a voluntary, accurate and truthful record of what the defendant said.

"So if you are unsure about the manner in which it was taken, if you are unsure as to the truth of its contents, you should disregard it completely. On the other hand, if you are satisfied so as to feel sure that the evidence of the two police officers is truthful, reliable, then you can take the statement into account and attach what weight to it you think is proper when considering the defendant's guilt of this ninth charge."

The judgment of the Court of Appeal

The ground of appeal on which the appeal succeeded was that "the judge erred in failing to direct the jury that the evidence of an accomplice must be credible before any question of corroboration can arise." The judgment of the Court of Appeal, delivered by Huggins V.-P., upheld this ground in the following passage:

"What is said is that the evidence of these two accomplice witnesses was so bad that it fell of its own inanition and could not be corroborated: *Director of Public Prosecutions v. Hester* (1972) 57 Cr.App.R. 212, 229. The jury was not warned that such a situation might arise and in the present case we think it was vital that it should be, for it might have thought that the evidence of the accomplices could in some way be resurrected by other evidence.

"We take the view that it is upon this second aspect of ground two that the appeal of the first defendant must succeed. Mr. Du Cann rightly submits that the fact that there was other evidence upon which the jury could (if it believed that evidence) properly have convicted the first defendant is no answer: it is impossible for us to know with certainty how the jury approached the matter and, if there remains a possibility that it approached the matter wrongly, the verdict cannot stand."

A short, but sufficient, refutation of this conclusion is, in their Lordships' respectful opinion, to be found in the following considerations: first, that the judge, in reviewing the accomplice evidence, not only made it clear that the jury should reject it if they did not find it credible, but gave them every encouragement to do precisely that; secondly, that the signed confession, attested as an accurate record of the defendant's voluntary statement by uncontradicted evidence, afforded an amply sufficient and independent ground on which the defendant could be convicted; thirdly, that, in the circumstances, the overwhelming probability is that the jury based their conviction on the confession in the light of the undisputed facts and there is no reason to suppose that they attached any significance to the evidence of the accomplices.

However, special leave to appeal having, no doubt, been granted to enable the Board to consider whether, in addition to the conventional directions regarding corroboration of accomplices' evidence, it was

necessary for the judge to give the further direction which he is alleged to have erroneously omitted, it is appropriate that their Lordships should address that issue.

Directions as to credibility

The rule requiring a warning to be given to a jury of the danger of convicting on uncorroborated evidence applies to accomplices, victims of alleged sexual offences and children of tender years. It will be convenient to refer to these categories as "suspect witnesses." The submission made for the defendant is that, at least in some cases, it is essential for a judge to direct a jury with reference to the evidence of a suspect witness to consider whether the witness is credible *before* considering any other evidence capable of providing corroboration. The implication of this submission and the sense in which it must have been understood by the Court of Appeal of Hong Kong is that, in such a case, the jury must be directed first to assess the credibility of the evidence given by the suspect witness in isolation from any other evidence in the case. If at this stage they find the evidence not to be credible, they are to reject it in limine. Only if, at the first stage, they find that the evidence is credible, are they to proceed to the second stage, which will involve an examination of any material capable of providing corroboration, a decision whether it does so and finally a decision whether the evidence of the suspect witness is, in the event, to be accepted and relied on.

It is said that this two stage approach is implicitly indicated by passages from speeches in the House of Lords in two of the leading authorities. In *Reg. v. Hester* [1973] A.C. 296, 315, Lord Morris of Borth-y-Gest said:

> "One of the elements supplied by corroborative evidence is that there are two witnesses rather than one. The weight of the evidence is for the jury—in cases where there is a trial by jury. It is for the jury to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. Any risk of the conviction of an innocent person is lessened if conviction is based upon the testimony of more than one acceptable witness. Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed would be to rule it out because of its essential nature and indeed because of its virtue. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence."

In *Reg. v. Kilbourne* [1973] A.C. 729, 746, Lord Hailsham of St. Marylebone L.C. said:

"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise. . . . Of course, the moment at which the jury must make up its mind is at the end of the case. They must look at the evidence as a whole before asking themselves whether the evidence of a given witness is credible in itself and whether, if otherwise credible, it is corroborated."

Before examining these passages further, their Lordships find it helpful first to consider whether the suggested two stage approach is one which good sense or judicial experience in assessing the credibility of evidence supports. There may, of course, be extreme cases where a witness under cross-examination is driven to admit that his evidence-in-chief was false. Such triumphs for the cross-examiner are more frequently seen in fictional courtroom dramas than in real life. But in such an extreme case, if it should happen, there would no longer be any question of credibility. Evidence which a witness first gives and then admits to have been false is no longer his sworn testimony and, if a criminal prosecution depends on it, the judge should direct an acquittal. But, apart from such extremes, any tribunal of fact confronted with a conflict of testimony must evaluate the credibility of evidence in deciding whether the party who bears the burden of proof has discharged it. It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability; it would, to their Lordships' minds, be surprising if the law requiring juries to be warned of the danger of convicting on the uncorroborated evidence of a witness in one of the suspect categories should have developed to the point where, in some cases, the jury must be directed to make such an assessment of credibility in isolation.

The concluding sentence in the passage which their Lordships have cited from the speech of Lord Hailsham of St. Marylebone L.C. in *Reg. v. Kilbourne* [1973] A.C. 729, 746, seems to point directly against the suggested two stage process. The passage as a whole, their Lordships think, is primarily emphasising what is plainly correct, viz. that the evidence of a suspect witness, even though it receives some independent support in a form capable of providing corroboration, cannot found a conviction unless itself accepted as true.

More difficulty arises from the passage cited from the speech of Lord Morris of Borth-y-Gest in *Reg. v. Hester* [1973] A.C. 296, 315, particularly the last sentence. It is possible to read the sentence as supporting the proposition that corroborative evidence cannot "give validity or credence to evidence which is . . . suspect." If this was indeed a proposition which Lord Morris of Borth-y-Gest intended to enunciate, it is one from which their Lordships feel constrained respectfully to dissent. It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called "suspect witnesses" may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence. The corroborative evidence will not, of course, necessarily authenticate the evidence of the suspect witness. But it may at least allay some of the suspicion. In other words it may assist in establishing the reliability of the suspect evidence.

Their Lordships attach particular significance to the words of Lord Reid in *Reg. v. Kilbourne* [1973] A.C. 729, 750:

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

This passage was relied on by Lord Hailsham of St. Marylebone L.C. in *Reg. v. Boardman* [1975] A.C. 421, 454, to refute a misinterpretation of his own observations in *Kilbourne* which had been advanced in an argument which seems to have been not dissimilar from the argument advanced on behalf of the defendant in the instant case.

If, as Lord Reid's dictum in *Reg. v. Kilbourne* [1973] A.C. 729, 750, suggests, the presence or absence of corroborative evidence may assist a jury to resolve, one way or the other, their doubts as to whether or not to believe the evidence of a suspect witness, it must, in their Lordships' judgment, be wrong to direct them to approach the question of credibility in two stages as suggested in the submission made on behalf of the defendant.

A very familiar situation where directions as to corroboration are required is where the case for the prosecution cannot succeed unless an accomplice witness is believed, but where there is some evidence capable of providing corroboration. Just such a case was *Reg. v. Turner (Bryan)* (1975) 61 Cr.App.R. 67. This was a case where the prosecution of a number of defendants charged with a series of bank robberies depended essentially on the evidence of a so called "supergrass" named Smalls. It was stated, at p. 83, that counsel for one of the defendants named Salmon

> "argued that the learned trial judge fell into error in his direction to the jury as to corroboration in that he failed to make it clear that

the jury had to be satisfied that Smalls was a credible witness before they considered the question whether there was evidence which corroborated Smalls in a material particular implicating Salmon in the crime charged."

James L.J. delivering the judgment of the Court of Appeal (Criminal Division), after rehearsing this argument and referring to some of the passages from the speeches of Lord Morris of Borth-y-Gest in *Reg. v. Hester* [1973] A.C. 296 and Lord Hailsham of St. Marylebone L.C. in *Reg. v. Kilbourne* [1973] A.C. 729 which have been quoted earlier in this judgment, said, 61 Cr.App.R. 67, 84:

"The credibility of the witness whose evidence requires corroboration is judged not on his evidence alone but on all the evidence in the case. In some cases that which adds credence to the evidence of the witness also serves to corroborate his evidence. In other cases evidence capable of providing corroboration is more clearly distinguishable from evidence which only goes to credibility. Some cases may call for a more emphatic or more elaborate direction than others. In the present case it must have been obvious to the jury from the start of the trial that, if they did not find Smalls to be a credible witness, that was the end of the case for the prosecution. This must have been even more obvious after the attack that was made upon the credibility of Smalls in the course of the trial."

Their Lordships can find no error in this passage. Where the prosecution relies on the evidence of an accomplice and where (in contrast with the instant case) the independent evidence capable of providing corroboration is not by itself sufficient to establish guilt, it will have become obvious to the jury in the course of the trial that the credibility of the accomplice is at the heart of the matter and that they can only convict if they believe him. The accomplice will inevitably have been cross-examined to suggest that his evidence is untrue. The jury will have been duly warned of the danger of relying on his evidence without corroboration. Their Lordships can see no sense in the proposition that the jury should be invited, in effect, to reject his evidence without first considering what, if any, support it derives from other evidence capable of providing corroboration.

Conclusion

A further ground of appeal argued before the Court of Appeal of Hong Kong to the effect that the verdict in this case was unsafe and unsatisfactory was not considered in the judgment of the Court of Appeal. No argument in support of that further ground was addressed to the Board, but it was suggested that it might be open to the defendant to reopen the matter before the Court of Appeal of Hong Kong. Their Lordships think the suggestion is erroneous. In the light of the advice tendered by the Board, the Order of Her Majesty in Council will finally dispose of the appeal against conviction. The separate appeal against sentence, on the other hand, which has never been determined, will now require to be considered and decided by the Court of Appeal of Hong Kong.

For the reasons indicated their Lordships will humbly advise Her Majesty that this appeal should be allowed and the defendant's conviction restored.

Solicitors: Charles Russell & Co.; Simmonds Church Smiles & Co.

26 February. Their Lordships (Lord Bridge of Harwich, Lord Griffiths and Lord Ackner) heard an application on behalf of the Attorney-General of Hong Kong for directions as to the powers of the Hong Kong authorities in the intervening period between delivery of their Lordships' judgment on 19 February and the meeting of the Privy Council at which it was expected that Her Majesty in Council would approve their Lordships' report. The grounds of the application were that (1) legal uncertainty existed in Hong Kong as to whether the defendant might be apprehended prior to their Lordships' judgment being incorporated in an Order in Council; and (2) there was a serious risk that the defendant would abscond before the Order in Council was made.

Lord Bridge of Harwich said that their Lordships would make no order on the application and express no opinion one way or the other as to the powers of the courts in Hong Kong in the matter pending the making of the Order in Council which would in due course implement the advice contained in the judgment delivered on 19 February. The Attorney-General was ordered to pay the defendant's costs.

Mark Strachan (instructed by Charles Russell & Co.) for the Attorney-General of Hong Kong. *Colin Nicholls Q.C. and David Whitehouse (instructed by Simmonds Church Smiles & Co.)* for the defendant.

S. S.

[HOUSE OF LORDS]

BUGDAYCAY . . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT . . . . . RESPONDENT

NELIDOW SANTIS . . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT . . . . . RESPONDENT

NORMAN . . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT . . . . . RESPONDENT

[CONSOLIDATED APPEALS]

[On appeal from REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* BUGDAYCAY; REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* NELIDOW SANTIS; REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* NORMAN]

In re MUSISI

1986 Nov. 10, 11, 13;
1987 Feb. 19

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Templeman, Lord Griffiths and Lord Goff of Chieveley

Immigration—Illegal entrant—Refugee—Limited leave to enter on basis of false statement—Non-disclosure of intention to stay as refugee—Admission on arrest—Application for asylum—Secretary of State refusing application—Whether illegal entrant—Whether review of decision on refugee status within court's jurisdiction—Immigration Act 1971 (c. 77), s. 4(1)[1]

Immigration—Refusal of entry—Intention to stay as refugee—Application for asylum—Secretary of State refusing application—Whether right of appeal before removal—Applicant arriving from country other than that where persecution feared—Possibility of refusal of re-entry at country of embarkation and removal to country feared—Whether relevant factor to be taken into account

The appellants B. and N. arrived in the United Kingdom on different dates and gave, unknown to immigration officers,

[1] Immigration Act 1971, s. 4(1): "The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(*a*) (whether as regards duration or conditions), shall be exercised by the Secretary of State; and, unless otherwise allowed by this Act, those powers shall be exercised by notice in writing given to the person affected, except that the powers under section 3(3)(*a*) may be exercised generally in respect of any class of persons by order made by statutory instrument."

S. 13(3): ". . . and a person shall not be entitled to appeal against a refusal of leave to enter so long as he is in the United Kingdom, unless he was refused leave at a port of entry and at a time when he held a current entry clearance or was a person named in a current work permit."

untrue reasons for their coming here. Both were granted temporary leave to stay but stayed on without making any application for an extension. After they were arrested they admitted that they had not told the truth and had, in fact, hoped to stay here. Neither of them wanted to return to his country for fear of being arrested for political activities. The chief immigration officer decided to treat them as illegal entrants within section 33(1) of the Immigration Act 1971. They applied for asylum but after inquiries the Secretary of State decided that they did not have a valid claim to asylum. The appellant, S., told the immigration officer on entry that he wanted to spend 15 days in the United Kingdom on holiday, but eight days later he made an application for asylum. He admitted during subsequent interviews that he had not told the immigration officer the truth because from the outset his intention was to apply for asylum. The Secretary of State refused his application and he was treated as an illegal entrant by immigration officers. B., N. and S. applied for leave to apply for judicial review under R.S.C., Ord. 53, r. 3(2), seeking certiorari to quash those decisions. Taylor J. and Woolf J. dismissed those applications. Their appeals, which were heard together, were dismissed by the Court of Appeal.

The appellant M. was temporarily admitted to the United Kingdom pending a decision upon his application for leave to enter as a visitor from Kenya. His application was refused but he thereupon applied for asylum as a refugee from Uganda. He alleged that he would not be allowed to re-enter Kenya but would be removed to Uganda where he believed that he would be killed. His advisers informed the Minister of State that they had received confirmation from a senior diplomatic representative of Kenya that M. was unlikely to be permitted to re-enter that country and in that event would be removed to Uganda. The Secretary of State did not seek to verify that statement but refused M. leave to enter on the grounds that he was not a genuine refugee. M.'s application for judicial review of the decision was dismissed and his appeal against that refusal was dismissed by the Court of Appeal.

On the appeals, which were heard together:—

Held, (1) dismissing the appeals of B., N. and S., that the question whether an applicant was a refugee entitled to asylum was a matter to be determined by the immigration officers or the Secretary of State when exercising their powers under section 4 of the Immigration Act 1971 in deciding whether to grant an applicant leave to enter or remain; that a claim to refugee status was only one of many questions to be determined in granting or refusing leave and there was no ground for treating it as an exception to the statutory provision in section 13(3) of the Act that decisions refusing leave to enter were not subject to appeal while the applicant remained in this country; that if the United Nations' recommendations required an applicant for refugee status to remain pending an appeal against a refusal of leave to enter that would be contrary to the express provisions of section 13(3) of the Act and an illegal entrant could not be in any different or better position than one who had been refused entry and that, accordingly, B., N. and S. were not entitled to remain in the United Kingdom pending appeals against refusal of refugee status (post, pp. 522D—523B, 524F—525B, 537A–E); that, further, where entry had been gained

on the basis of untrue statements of facts, the immigration officers were entitled to treat such persons as illegal entrants upon discovery of the true facts and it was not open to them to contend that had they given the true facts to the immigration officer he might have given them leave to enter (post, p. 525B–F).

Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74, H.L.(E.) considered.

(2) Allowing the appeal of M., that although the question whether there was a danger that the removal of a person claiming refugee status to a third country would result in his return to the country where he feared persecution lay exclusively within the jurisdiction of the Secretary of State, that question had not been adequately considered by him in relation to M. and the decision to remove him having been made without considering the evidence adduced of such danger, the order would be quashed (post, pp. 533G—534B, 537G—538B).

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223, C.A. applied.

Decision of the Court of Appeal in *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1986] 1 W.L.R. 155; [1986] 1 All E.R. 458 affirmed.

Decision of the Court of Appeal in *In re Musisi* reversed.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74; [1983] 2 W.L.R. 321; [1983] 1 All E.R. 765, H.L.(E.)

The following additional cases were cited in argument:

Reg. v. Immigration Appeal Tribunal, Ex parte Enwia [1984] 1 W.L.R. 117; [1983] 2 All E.R. 1045, C.A.

Reg. v. Immigration Appeal Tribunal, Ex parte Muruganandarjah, (unreported), 16 July 1984; Court of Appeal (Civil Division) Transcript No. 300 of 1984, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Jayakody [1982] 1 W.L.R. 405; [1982] 1 All E.R. 461, C.A.

Simsek v. Minister for Immigration and Ethnic Affairs (1982) 40 A.L.R. 61

APPEALS from the Court of Appeal.

These were consolidated appeals by (1) Huseyin Bugdaycay, Michael Nelidow Santis and Daniel Tawiah Norman from the order of the Court of Appeal (Oliver, Neill and Balcombe L.JJ.) [1986] 1 W.L.R. 155 dismissing their appeals, which were heard together, against orders of Woolf J. dated 24 January 1984 in Norman's case and of Taylor J. dated 28 June 1985 in Bugdaycay and Nelidow Santis's cases, refusing their applications for judicial review of decisions of the Secretary of State for the Home Department refusing each of the appellants asylum and of decisions of immigration officers in each case to treat the appellants as illegal entrants under the Immigration Act 1971 and (2) Herbert Crispian Musisi from the order of the Court of Appeal (Watkins, Purchas and Dillon L.JJ.) on 24 May 1985 dismissing his appeal against the refusal of

A Mann J. on 1 November 1984 to grant judicial review of a similar decision of the Secretary of State for the Home Department.

The facts are set out in the opinion of Lord Bridge of Harwich.

Michael Beloff Q.C., *Alper Riza* and *Andrew Nicol* for the appellants Bugdaycay, Nelidow Santis and Norman. These appeals raise issues as B to the impact upon the system of immigration control of the United Kingdom being a party to the Geneva Convention Relating to the Status of Refugees 1951 (Cmd. 9171) and Protocol (1967) relating to the Status of Refugees (Cmnd. 3906) ("the Convention"), and the requirement not to act contrary to those obligations; in particular, whether in consequence thereof, a person who asserts that he is a refugee is entitled to have his claim to be and to be treated as if he were such a refugee examined by C the High Court or under the appeals system established by Part II of the Immigration Act 1971. The decisions not to recognise the appellants' status as refugees so as to permit them to remain in the United Kingdom under section 3(1)(*b*) of 1971 and to treat them as illegal entrants and to direct their removal under paragraph 9 of Schedule 2 to the Act of 1971 were unlawful for the following three alternative reasons:

D (1) By virtue of the Convention and the Immigration Rules it is a precondition of the exercise by an immigration officer of the power to remove that the intended object of that power is not a person who has the status of a refugee and accordingly fears relevant persecution in the country to which he would be removed. In the case of a dispute as to whether a person is such a refugee it is for the court to determine if his claim to refugee status is well-founded.

E (2) A person is an illegal entrant by deception and hence liable to removal only if the immigration authorities would have been bound to refuse leave to enter had he told the truth. If the appellants are refugees (which it is for the court to determine), the falsehoods which it was found they had told (concerning their length of stay and intention to work) would not have precluded them being granted leave to enter and so were not material. Alternatively refugees (unlike other persons F subject to immigration control) who enter by deception are not illegal entrants. If the appellants are refugees (which is for the court to determine) their deception in any case would not have made them illegal entrants. [Reference was made to *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74 and *Reg. v. Secretary of State for the Home Department, Ex parte Jayakody* [1982] 1 G W.L.R. 405.]

(3) The immigration authorities, by deciding to remove the appellants as illegal entrants and not to seek to effect their departure by other means which would have given them a right of appeal, misdirected themselves. The immigration authorities are not obliged to exercise their powers of removal in respect of persons who have obtained leave to enter by means of false representations. They had a discretion to treat H the appellants as overstayers or (in relation to the appellant Santis) as an applicant for variation of the terms of his leave to enter. In as much as the appellants claimed to be refugees, that discretion could only reasonably be exercised in the manner set out above. Under article 35 of

the Convention, at the very least the Secretary of State in treating cases of refugees is obliged to take account of the precepts of the Handbook on Procedures and Criteria for Determining Refugee Status (1979) U.N.H.C.R. paragraph 192, which would lead to an appeals procedure.

Andrew Collins Q.C. and *Christa Fielden* for the appellant Musisi. Musisi was on the Home Office's own finding a refugee from Uganda, the country of his nationality, and therefore he cannot be expelled: article 32 of the Convention. Alternatively, the Secretary of State manifestly has not applied his mind to the right question, namely, was the appellant a Ugandan refugee, in which case the matter should be heard again by him. [Reference was made to *Simsek v. Minister for Immigration and Ethnic Affairs* (1982) 40 A.L.R. 61.] There is in any event a right of appeal against both the refusal of leave to enter and the direction that the appellant be removed to Kenya (from where he had arrived in the United Kingdom) by virtue of section 17(1) of the Act of 1971. If the right of appeal by virtue of section 17 is to have any validity, it must be exercisable *before* the relevant would-be entrant has departed: otherwise, it will be too late because he will already have been removed to the country to which he does not want to go. Refugees or asylum seekers will be especially concerned not to be returned to a particular country, so that for them the section 17 appeal is of the greatest importance. Parliament would have recognised this and the dangers of "refoulement" if such an appeal did not exist. The words "unless . . . he is also appealing under section 13(1) [of the Act of 1971]" in section 17(5) must in the circumstances look to the future, a perfectly natural meaning of the phrase. This construction is supported by rule 4(10)(*a*) of the Immigration Appeals (Procedure) Rules: rules 7(3), 14(2)(*b*) and 17(3) recognise the importance of conformity with the Convention and the need to examine very carefully any claim to be treated as a refugee. The words "if at all" in section 17(1) recognise that an appellant may contend that he should not be removed at all if, for example, he is unable to specify an alternative country but can only say that he must not be removed to the proposed country. The decision of the Court of Appeal in *Reg. v. Immigration Appeal Tribunal, Ex parte Muruganandarjah* (unreported), 16 July 1984, is wrong because it fails to appreciate the difference between an appeal against (in that case) a decision to deport and an appeal against removal directions. If leave to enter is refused or it is decided to deport *but* the Secretary of State is unable to find anywhere he can properly send the person in question (see paragraphs 8(1)(*c*) and 10(1) of Schedule 2 to the Act of 1971), he may have to let him stay, not because the refusal of leave or the decision to deport was wrong but because there is no place to which he can be removed. This approach is in accord with that of the Court of Appeal in *Reg. v. Immigration Appeal Tribunal, Ex parte Enwia* [1984] 1 W.L.R. 117. If that proposition is wrong, an appellant can specify any country (whether or not he could in fact ever hope to get there) and would then have a clear right of appeal in which he could raise the refugee issue. Accordingly, the appellant ought to have been given a right of appeal which he could now exercise. (In any event, the removal directions are bad because none of the notices informing the appellant

of them included information about his rights of appeal—whatever the extent of those rights—under section 17.)

John Laws and *Philip Havers* for the Secretary of State. It is accepted that rights of appeal under section 17 of the Act of 1971 are exercisable from within the United Kingdom, but section 17(5) does *not* contemplate that an appeal under section 13(1) against refusal of leave to enter may always be coupled with a section 17 appeal when removal directions have been made, with the consequence that it may be launched and determined while the appellant remains in the United Kingdom. Section 17(5) *bars* removal directions appeals where the directions have been given on refusal of leave to enter *save where the appellant has a right of appeal exercisable from within the United Kingdom in any event*: compare the closing words of section 17(5) with the closing words of section 13(3). The *Muranandarjah* case (unreported), 16 July 1984, was correctly decided. The specification of a destination to which an appellant has not the remotest prospect of travelling as an artificial means of putting an asylum appeal within section 17(1) would be a colourable device. On the point as to any of the removal directions failing to comply with the notices regulations, the point is entirely academic since all the directions have long been spent and the appellant could not in any event be removed without the making of new removal directions.

Turning to the argument that the appellants can rely on article 32 of the Convention as being "lawfully in [the contracting state's] territory," that provision must mean that the person's claim to enter the United Kingdom has been accepted and cannot refer to a person who is merely in the United Kingdom under a temporary arrangement pending a decision or under sufferance pending removal: see paragraph 16 of Schedule 2 to, and sections 1(1), (2) and 11 of, the Act of 1971; and therefore the Convention cannot assist the appellant Musisi.

With regard to paragraph 192 of the 1979 handbook as to the procedures to be adopted by states adhering to the Convention for determination of applications for refugee status, the procedures that are in place for reconsideration by M.P.s' letters clearly are within the spirit of the paragraph 192 recommendations; so it is not accepted that anything in the Secretary of State's treatment of these appellants has been other than loyal to and consistent with the guidance given by the Office of the United Nations High Commissioner for Refugees through the handbook.

Beloff Q.C. replied.

Collins Q.C. in reply. If there is a case where as a matter of fact there is some doubt in the minds of the administrators, there ought to be the granting of formal leave to enter until the matter is resolved, though the Secretary of State undoubtedly has a discretion. The decision whether the appellant Musisi was a refugee was central to the Secretary of State's decision as to whether or not he should be removed. If he is a refugee then article 33 of the Convention will apply and the Secretary of State is bound to consider whether there would be a breach of the terms of the Convention. There is a breach of the Immigration Rules in the

failure to decide whether he was a refugee when the evidence was there to clearly infer that he was. A

Their Lordships took time for consideration.

19 February. LORD BRIDGE OF HARWICH. My Lords, these four appeals were heard together by consent of all parties. All are concerned with questions as to the treatment in domestic law of those who claim to be refugees under the Geneva Convention relating to the Status of Refugees 1951 (Cmd. 9171) and Protocol (1967) relating to the Status of Refugees (Cmnd. 3906) ("the Convention"). The background material in the Immigration Act 1971 ("the Act"), the rules made thereunder and the Convention itself is common to all four appeals. The issues which arise in the first three appeals are identical. The issues raised in the appeal of Musisi overlap to some extent with the issues in the first three appeals. The appeal of Musisi, however, raises difficult and entirely distinct issues which will require examination in some detail of the facts peculiar to that case. At the outset it will be convenient to give a brief outline of the facts so far as necessary for the proper examination of the common issues. B C D

The first three appellants separately obtained leave to enter the United Kingdom under the Act. Bugdaycay was granted leave to enter as a student, Santis as a holiday visitor, Norman as a business visitor. In due course each claimed to be entitled to asylum in this country as a refugee from his country of origin. The claim in the case of Santis was made before the expiry of his temporary leave to enter, but the other two only made their claims after the expiry of their leave to enter and after they had been arrested as overstayers. The Secretary of State refused each of the claims to asylum and directions were given in each case for the removal of the appellant as an illegal entrant pursuant to paragraph 9 of Schedule 2 to the Act. Each applied for judicial review. The applications of Bugdaycay and Santis were refused by Taylor J., that of Norman by Woolf J. Their appeals were heard together by the Court of Appeal (Oliver, Neill and Balcombe L.JJ.) and dismissed. A fuller account of the facts which I have very briefly summarised will be found in the judgment of Neill L.J. [1986] 1 W.L.R. 155, 157–158. The appellants now appeal by leave of your Lordships' House. E F

The appellant Musisi applied for leave to enter as a visitor from Kenya. Pending a decision upon that application he was temporarily admitted to the United Kingdom pursuant to paragraph 21 of Schedule 2 to the Act. His application for leave to enter was refused, but he thereupon immediately applied for asylum as a refugee from Uganda. His temporary admission was extended indefinitely pending consideration of that application. I shall later have to examine the history of his case in detail but at this stage it suffices to say that a final decision was made refusing him leave to enter and directions were given for his removal and return to Kenya in January 1984. His application for judicial review was refused by Mann J. and his appeal against that refusal was dismissed by the Court of Appeal (Watkins, Purchas and Dillon L.JJ.). He too now appeals by leave of your Lordships' House. G H

A This is the first time your Lordships' House has had to consider the Convention. The questions arising from its impact on domestic law are of undoubted importance both to those claiming refugee status and to the authorities responsible for the operation of the system for the control of immigration established by the Act and rules made thereunder.

The relevant definition of "refugee" in the Convention is

B "any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

The provisions in the Convention of primary importance are the C following:

"Article 32. 1. The contracting states shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

"Article 33. 1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account D of his race, religion, nationality, membership of a particular social group or political opinion."

The relevant rules laid down by the Secretary of State pursuant to section 3(2) of the Act "as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the E United Kingdom of persons required by this Act to have leave to enter" are found in the Statement of Changes in Immigration Rules (1983) (H.C.169). The rules are divided into two sections: Section One, Control on Entry; Section Two, Control after Entry. Paragraph 16 in Section One and paragraph 96 in Section Two, each headed "Refugees," are in identical terms as follows:

F "Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees [Cmd. 9171 and Cmnd. 3096]. Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments."

The paragraphs headed "Asylum" in Sections One and Two are G respectively paragraphs 73 and 134 and provide as follows:

"73. Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or politicial opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person H seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. Leave to enter will not be

refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of Refugees.

"134. A person may apply for asylum in the United Kingdom on the ground that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any such claim is to be carefully considered in the light of all the relevant circumstances."

The primary submission made on behalf of the first three appellants is that the immigration rules prohibit their removal and return to their own countries whence they came unless and until the courts have adjudicated upon and rejected their claim to be refugees from those countries. The argument proceeds by stages. Each claims to be a refugee from the country of his nationality. To return him to that country, therefore, would contravene article 33.1 of the Convention. Paragraph 73 of H.C.169 prohibits removal contrary to the provisions of the Convention. It follows, so it is said, that the Secretary of State cannot give himself power to make a decision leading to a person's removal contrary to the rules by finding as a fact that he is not a refugee, if in truth he is. The conclusion, it is submitted, is that, if the Secretary of State has purported to make such a decision, the court, on an application for judicial review, is not confined to considering whether there was evidence to support the decision of the Secretary of State, but must examine the evidence and make its own decision. Only if the court is satisfied on a balance of probabilities that the person claiming asylum is *not* a refugee, can the decision to remove him to his country of origin be affirmed.

This line of reasoning is said to be supported by analogy by the decision in *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74 that when directions given pursuant to paragraph 9 of Schedule 2 to the Act for the removal of an illegal entrant are challenged on an application for judicial review, it is for the immigration officer or the Secretary of State, as the case may be, to establish the fact of illegal entry.

The reason why this argument cannot be sustained is that all questions of fact on which the discretionary decision whether to grant or withold leave to enter or remain depends must necessarily be determined by the immigration officer or the Secretary of State in the exercise of the discretion which is exclusively conferred upon them by section 4(1) of the Act. The question whether an applicant for leave to enter or remain is or is not a refugee is only one, even if a particularly important one required by paragraph 73 of H.C.169 to be referred to the Home Office, of a multiplicity of questions which immigration officers and officials of the Home Office acting for the Secretary of State must daily determine in dealing with applications for leave to enter or remain in accordance with the rules, as, for example, whether an applicant is a bona fide visitor, student, businessman, dependant etc. Determination of such questions is only open to challenge in the courts on well known

Wednesbury principles [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223]. There is no ground for treating the question raised by a claim to refugee status as an exception to this rule. For the reasons explained at length in the speeches in *Khawaja's* case the court's fundamentally different approach to an order for removal on the ground of illegal entry is dictated by the terms of the statute itself, since the power to direct removal under paragraph 9 of Schedule 2 is only available in the case of a person who is in fact an "illegal entrant."

All four appellants next submit that before their claims to asylum as refugees can be finally refused and before they can be required to leave this country they are entitled, by one route or another, to appeal to the appellate authorities under Part II of the Act. Section 13(1) gives a right of appeal to an applicant against refusal of leave to enter, but section 13 prevents its exercise, subject to exceptions not presently relevant, so long as the intending appellant is in the United Kingdom. Section 14(1) gives a right of appeal to a person who has a limited leave to enter or remain against refusal to vary that leave. Section 15 gives a right of appeal against a decision of the Secretary of State to make a deportation order. Section 17 gives a right of appeal against directions for a person's removal to a particular country on the ground that "he ought to be removed (if at all) to a different country or territory specified by him." At one time Mr. Collins, for Musisi, presented an ingenious argument that section 17 gives to a person claiming asylum who objects to removal to the country named in the directions appealed against, but can specify no other, an effective opportunity to appeal while still in the United Kingdom even though he has been refused leave to enter. A careful reading of section 17(5), however, shows, as Mr. Collins in due course accepted, that, in the case of a person refused leave to enter, an appeal against removal directions lies only in three exceptional cases, none of which is applicable to Musisi.

A further argument advanced in the written case for Musisi, of which Mr. Collins was not the author, but which he did not feel he could properly abandon, was that the necessary reference to the Home Office for decision pursuant to paragraph 73 of H.C.169 of a claim to asylum should be taken as the grant, by implication, of temporary leave to enter, giving the person claiming asylum a right of appeal under section 14(1) against a refusal to extend that leave. This is, however, wholly inconsistent with the language of the concluding sentence of paragraph 73: "Leave to enter will not be refused . . . etc."

The main argument on this aspect of the case was advanced on behalf of the first three appellants by Mr. Beloff. He draws attention to article 35 of the Convention, whereby "contracting states undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions." The Office of the United Nations High Commissioner for Refugees (U.N.H.C.R.) published in 1979 a "Handbook on Procedures and Criteria for Determining Refugee Status." From paragraph 192 of that publication we learn that in 1977 the Executive Committee of the High Commissioner's Programme recommended that the procedures to be adopted by states adhering to

the Convention for determination of applications for refugee status should satisfy certain basic requirements. The relevant recommendations read as follows:

> "(iii) There should be a clearly identified authority—wherever possible a single central authority—with responsibility for examining requests for refugee status and taking a decision in the first instance. . . .
> "(vi) If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
> "(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending."

It is submitted that the basic requirements set out in paragraphs (vi) and (vii) can only be satisfied if an unsuccessful applicant is accorded a right of "appeal . . . according to the prevailing system," which in the United Kingdom must mean an appeal to the appellate authorities under Part II of the Act, exercisable before he is required to leave the country. Removal of the appellants as illegal entrants would deprive them of any such right of appeal. On the other hand the alternative course of making deportation orders in the case of Bugdaycay and Norman and simply refusing to extend leave to remain in the case of Santis, would have opened an avenue of appeal in each case in which the decision of the Secretary of State could have been challenged. In deciding to proceed against them as illegal entrants and neglecting the alternative, the Secretary of State, it is submitted, must have failed to have regard to the recommendations of the Executive Committee of the High Commissioner's Programme.

My Lords, there was some discussion in the courts below of the question whether the practice of the Home Office complied with recommendation (vi). I express no opinion on that question, since it is, as it seems to me, neither necessary nor desirable that this House should attempt to interpret an instrument of this character which is of no binding force either in municipal or international law.

The fact that the first three appellants are proposed to be removed summarily as illegal entrants obscures the true implication of the argument advanced by Mr. Beloff on their behalf. If the effect of the 1977 recommendations were to require the Secretary of State to treat every applicant for refugee status in such a way as to enable the application, if initially unsuccessful, to be tested by way of an appeal under Part II of the Act while the appellant remained in the United Kingdom, this would apply not only to those who had secured entry illegally, but to every applicant for refugee status who, on arrival in this country, was refused leave to enter. The result would then be that the Secretary of State's duty to act in conformity with the obligation of the

A United Kingdom under the Convention to co-operate with the Office of the U.N.H.C.R. and to have regard to the recommendations made by the Executive Committee in 1977 would override the express terms of section 13(3) of the Act, which prohibits an appeal against refusal of leave to enter so long as the intending appellant is in the United Kingdom. This is plainly untenable. It is equally plain that a person who has secured entry illegally can be in no better position in this regard B than a person refused leave to enter. Mr. Beloff's argument must therefore be rejected.

The first three appellants finally challenge the decision to remove them summarily by direction under paragraph 9 of Schedule 2 on the ground that they are not illegal entrants. It is common ground that each committed an offence under section 26(1)(*c*) by misrepresenting to an C immigration officer on arrival in this country the true nature and purpose of his visit. It is submitted, however, that the misrepresentations were not material, since the appellants would not necessarily have been refused leave to enter if they had originally claimed to enter as refugees.

After setting out the argument and the citations from authority on which this submission relies for support, Neill L.J. disposed of it in the following paragraphs [1986] 1 W.L.R. 155, 160–161:

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> "In my judgment it is impermissible to extend the concept of material facts so as to allow an intending entrant to seek leave to enter for a particular purpose on the basis of a statement of particular facts and then later, on admitting that the purpose had been misrepresented and the facts had been misstated, to contend he was not an illegal entrant because if he had told a different story E and had put forward a different reason for his visit he might well have been given leave.
>
> "The question whether facts are material or decisive has to be answered in the context of the leave which was in fact given. The Act of 1971 makes this clear. Thus the appellants were seeking to enter the United Kingdom by making statements or making representations to the immigration officers which they knew to be F false or did not believe to be true. The misstatements or misrepresentations were not on matters of detail but constituted versions of the appellants' intentions which were in fundamental respects at variance with the truth. The decisions that these appellants were illegal entrants appears to me to be unassailable."

G I cannot improve on this reasoning with which I agree and which I gratefully adopt.

I would, therefore, dismiss the first three appeals.

The case of Musisi raises first a distinct issue of law. The decision to refuse him leave to enter was not based on the denial of his claim to refugee status quoad Uganda, which is the country of his nationality, but on a conclusion by the Secretary of State that, even if he is properly to H be treated as a refugee from Uganda, within the definition of "refugee" under the Convention, this presents no obstacle to his return to Kenya whence he came to this country. The primary submission made by Mr. Collins on his behalf is that, if he is a refugee, as is to be assumed, he is

protected not only by article 33.1 of the Convention against return to the country where he fears persecution, but also by article 32.1 against return to any other country because he is now "lawfully in [the] territory" of the United Kingdom and cannot, therefore, be expelled save on grounds of national security or public order. The temporary admission pursuant to paragraph 21 of Schedule 2 to the Act of an applicant for leave to enter pending a decision on his application has the effect, it is submitted, of making the applicant's presence in the United Kingdom lawful for the purpose of his entitlement to the protection of article 32.1 of the Convention.

Section 11(1) of the Act provides:

> "A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act."

Mr. Collins was constrained to concede that, if his argument is right, it must apply equally to any person arriving in this country at a regular port of entry and presenting himself to the immigration authorities, whether he is detained or temporarily admitted pending a decision on his application for leave to enter. It follows that the effect of the submission, if it is well-founded, is to confer on any person who can establish that he has the status of a refugee from the country of his nationality, but who arrives in the United Kingdom from a third country, an indefeasible right to remain here, since to refuse him leave to enter and direct his return to the third country will involve the United Kingdom in the expulsion of "a refugee lawfully in their territory" contrary to article 32.1.

The United Kingdom was already a party to the Convention when the Act was passed and it would, to my mind, be very surprising if it had the effect contended for. But I am satisfied that the deeming provision enacted by section 11(1) makes Mr. Collin's submission on this point quite untenable.

My Lords, I now turn to the most difficult issue, which arises from the unusual facts in the case of Musisi. The question is whether there is any available ground on which the discretionary administrative decision to remove the appellant to Kenya can properly be challenged in judicial review proceedings. Not the least surprising feature of the case is that this question was raised for the first time in your Lordships' House. The different counsel who appeared for the appellant in the courts below advanced only a single argument which has now been abandoned, but, furthermore, the very experienced counsel appearing before Mann J. expressly disclaimed any challenge to the decision of the Secretary of State on *Wednesbury* principles ([1948] 1 K.B. 223). Nevertheless, a

A detailed examination of the way in which the application made by the appellant for asylum was dealt with by the immigration authorities gives cause for grave concern.

The appellant Musisi arrived at Heathrow airport on a flight from Nairobi on 23 January 1983. He sought leave to enter the United Kingdom for the purpose of visiting his two half sisters, both now settled in the United Kingdom and one of whom was his sponsor. He and his B sponsor were both interviewed by an immigration officer on the day of his arrival. There were discrepancies in what they told the officer, who was not satisfied and decided to make further inquiries. The appellant was granted temporary admission until 26 January. On that day he was again interviewed by another immigration officer and the decision was then taken to refuse him leave to enter as a visitor. His temporary C admission was extended to the following day when he was to be removed by the airline with which he had arrived.

On the morning of 27 January, however, a claim by the appellant to political asylum as a refugee from Uganda was communicated to the Home Office on his behalf by the United Kingdom Immigration Advisory Service. This resulted in a further extension of the appellant's temporary admission "pending further consideration of your case" which remains in D operation to this day.

Nothing, I think, now turns on any inaccuracies or discrepancies in the account which the appellant gave of himself when posing as an intending visitor, save that his omission to claim political asylum in the first instance has naturally engendered a degree of scepticism about the claim. But the appellant has always put forward the explanation that he E had been advised to try to gain entry as a visitor and then to seek asylum through the "refugee office" in London, which seems not to be wholly implausible and which, so far as the evidence shows, has not been rejected by the Home Office as untrue.

On 27 January 1983 the appellant was interviewed in connection with his claim to asylum by an immigration officer at Heathrow. This was an interview of first importance, since it was the only occasion in these F protracted proceedings when the appellant was ever questioned face to face by an official acting on behalf of the Secretary of State. The immigration officer gives an account of this interview in an affidavit sworn in the proceedings and also exhibits his contemporary notes in a document entitled "Political Asylum Interview Questionnaire." I shall endeavour to extract from these discursive documents a summary of the G relevant factual information presented by the appellant. He was born on 30 June 1960. He was educated in Uganda until 1973. In 1973 his father fled from Uganda to Kenya, but was arrested there and returned to Uganda. He was never seen again and was believed to have been murdered by the Ugandan Secret Police. The appellant and his mother were in Kenya from 1974 to 1979 where the appellant continued his schooling. They both returned to Uganda in 1979. The mother left in H 1980 to return to Kenya once more where she has since remained. Other siblings are also in Kenya. The appellant's two half sisters, now in England, had been harrassed by soldiers in Uganda. I interpolate that, according to the appellant's own affidavit, he was in 1982 living in

Uganda with an aunt and two cousins. At about this time he told the immigration officer that he was himself accused of being a guerilla and beaten up. One of his cousins was arrested and taken to a barracks where he died of injuries inflicted on him. Before he died he gave the authorities particulars of his friends and relatives including the appellant. His other cousin had since been arrested and killed. The appellant feared the same fate awaited him in Uganda if he returned. The appellant last left Uganda in June 1982. He claimed that he had applied or attempted to apply for political asylum in Kenya but had been unsuccessful. His temporary permit to remain in Kenya would expire on 5 March 1983.

In his contemporary note of the interview with the appellant the immigration officer writes:

> "The passenger is an educated, intelligent, plausible individual who comes from the upper strata of Ugandan society. He would have me believe that Uganda is still a turbulent and violent country and should he return there he feels his life would be in danger. Significantly he did not claim political asylum upon his arrival in the U.K. but sought to pass himself off as a bona fide visitor who was coming for a three week visit to see his sisters."

In the final paragraph he concludes:

> "The passenger appeared in good health, was alert and confident at interview. My feelings are that he is moving away from Uganda because a better life awaits him somewhere else. Perhaps our people in Kampala can give a report on the current political, social and law and order position at present pertaining in Uganda."

In his affidavit sworn 18 months later the immigration officer expresses his conclusion differently in the following paragraph:

> "I formed the view that the applicant, who appeared to be in good health, was alert and confident at interview, was moving away from Uganda because a better life awaited him somewhere else and that this was not a genuine application for asylum."

I find it strange that such an important interview as this should be entrusted to an immigration officer at the port of entry with no knowledge of conditions in the country of origin of a claimant for asylum. It seems even stranger that having suggested that local conditions should be investigated, presumably with the object of assessing the background to the claim for asylum, the interviewer should later assert that he was in a position to, and did, reject it as not being genuine. Fortunately this view has never been adopted by the Home Office as the basis for a decision on the appellant's application for leave to enter. The department has, in effect, been content to leave open and undecided the question whether the appellant is a bona fide "refugee" as defined in the Convention. But it does little to inspire confidence in the procedure that the Home Office should have based their further consideration of the case on the immigration officer's report.

The next stage in the consideration of the application for leave to enter is explained in the main affidavit sworn on behalf of the Secretary

of State by Mr. McDowall, a Senior Principal in the Immigration and Nationality Department of the Home Office. Two long paragraphs of his affidavit examine in minute detail various aspects of the appellant's account as reported by the immigration officer casting inferential doubts on various aspects of that account, in particular the appellant's assertion that he had applied for and been refused political asylum in Kenya. The conclusion reached at this stage is expressed in the affidavit as follows:

> "In considering the above mentioned matters due regard was had to the problem of harrassment and intimidation which the applicant and his family had experienced in Uganda, but it was considered to be of significance that the applicant had spent six out of eight years during the period 1974-1982 in Kenya where his mother, a brother and two sisters reside and where he had been living for the six months immediately prior to his departure for the United Kingdom. In these circumstances it was concluded that the applicant had come to the United Kingdom from a safe country and that were he to be refused entry then he would not be required to go to Uganda but could return to Kenya instead and his application for asylum in this country was therefore refused."

The formal refusal of the application for asylum and directions for the appellant's removal to Kenya were communicated to the appellant on 12 March 1983. Before these directions were acted on Mr. John Tilley M.P. intervened on the appellant's behalf writing to the Minister of State and enclosing a long statement by the appellant amplifying in considerable detail the account he had given of the persecution of his family in Uganda and of the difficulties he had encountered in seeking to establish a basis on which to remain in Kenya. The Minister of State, in his reply dated 8 July 1983, summarised the history and expressed his conclusion, confirming the decision to refuse the appellant leave to enter, in the phrases I have already quoted from the affidavit of Mr. McDowall that the appellant had come from "a safe country" and "would not be required to go to Uganda but could return to Kenya instead." Fresh directions for the appellant's removal on 21 July were issued but again were not acted on.

This time the appellant's case was taken up by Mr. Stuart Holland M.P., who wrote to the Minister of State on 9 August 1983, enclosing a letter dated 30 July from a Mr. Anthony Rose of the Stockwell and Clapham Law Centre who was now acting for the appellant. Mr. Rose wrote:

> "The Home Office's decision to remove Herbert Musisi to Kenya appears to ignore the fact that Mr. Musisi will not be allowed to enter Kenya and will almost certainly be immediately removed to Uganda where he has a well-founded fear that he will be deliberately killed. This is because the situation in Kenya has changed drastically since the troubles last year as a result of which their immigration control has been considerably tightened up. I in fact spoke on the telephone on Tuesday to the First Secretary of the Kenyan High Commission who confirmed that Mr. Musisi could only be given leave to enter Kenya if he possessed a work permit (obtainable only

in similar circumstances to a work permit for the U.K.) or a student visa in which case he would have to have been accepted by an appropriate educational institution for a course of study which he has paid for. She further confirmed that if Mr. Musisi were to arrive in Kenya without permission to enter he would be removed to Uganda."

In his reply, dated 5 October 1983, the Minister of State comments on this letter as follows:

> "The enclosed letter suggests that Mr. Musisi might be in danger of being refused entry on his arrival back in Kenya and removed at once to Uganda, but given his residential and family ties with Kenya and the fact that Kenya is a signatory to the 1951 U.N. Convention Relating to the Status of Refugees and would not knowingly remove a Ugandan citizen to Uganda if there was reason to believe he would be persecuted there, summary removal to Uganda strikes me as unlikely in the circumstances."

The Minister of State's letter goes on to suggest that the appellant should enlist the assistance through the London representative of the U.N.H.C.R. of the Nairobi office of that organisation.

Mr. Rose acted on this suggestion and in further lengthy correspondence, which was submitted to the Minister of State by Mr. Stuart Holland M.P., set out what he had been told by representatives of the U.N.H.C.R. which he regarded as the reverse of reassuring. In his final reply, dated 13 January 1984, the Minister of State contented himself by saying that he did not "accept Mr. Rose's pessimistic interpretation of the advice given by U.N.H.C.R." He confirmed his previous decisions. Notice was given to the appellant, dated 16 January 1984, directing his removal to Kenya by a flight leaving on 19 January 1984. Presumably notice to the Home Office of an intention to apply for judicial review prevented the implementation of these directions. Leave to apply for judicial review in these proceedings was granted on 1 February 1984.

Following the passage to which I have earlier referred, the affidavit of Mr. McDowall gives a short account of the exchanges between the Members of Parliament who intervened on the appellant's behalf and the Minister of State, and concludes as follows:

> "It is international practice that where foreign nationals embark from a country other than their own for a third country and that third country refuses them permission to land that they are returned to and accepted by the country from which they embarked and in such circumstances, it is not open to the Kenyan authorities to refuse this applicant leave to enter and should he satisfy the Kenyan authorities that he is indeed a refugee in that he has a well founded fear of persecution for the reasons referred to above then Kenya as a signatory to both the United Nations Convention on the Status of Refugees 1951 and the African Convention on Refugees 1969 is unlikely to return him to Uganda in breach of such international obligations."

In addition to the evidence originally filed in support of the appellant's application for judicial review, two further affidavits sworn in October 1984 were put in evidence. One is by a Ugandan lawyer, now himself a refugee from that country. He gives a long and detailed account of the difficulties experienced in Kenya by Ugandans seeking to establish their status as refugees from their own country and of their frequent repatriation to whatever fate might await them in Uganda. The second deponent is a former Attorney-General and President of Uganda who testifies to the practice of the Kenyan authorities in arresting and repatriating refugees from Uganda. The reply to this evidence is contained in the affidavit of a Mr. Handley, a senior executive officer in the Immigration and Nationality Department of the Home Office. In this affidavit Mr. Handley states, echoing the language used by the Minister of State in his letter of 5 October 1983, that

> "it is the respondent's belief that Kenya as a signatory to the United Nations Convention relating to the status of refugees would not knowingly remove a Ugandan citizen to Uganda if there was reason to believe he would be persecuted there."

He refers to the evidence alleging repatriation of Ugandan refugees from Kenya and comments as follows:

> "I can say that although it has been the case that Kenya has returned Ugandan nationals to Uganda in the past the respondent has no evidence that this continues to be the case and indeed earlier this year after representations had been made to it by the United Nations High Commissioner for Refugees the Kenyan Government confirmed its position as a signatory to the said Convention."

I approach the question raised by the challenge to the Secretary of State's decision on the basis of the law stated earlier in this opinion, viz. that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

This is not, of course, a case where the claim to refugee status itself is in issue. The decision of the Secretary of State, as already pointed out, proceeds upon the implicit assumption that the appellant has or may have a well-founded fear of persecution in Uganda. Upon this premise to remove him directly to Uganda would be a clear breach of the Convention. The troublesome question is how far the provisions of the Convention, to the extent that they are incorporated in the relevant immigration rules, should be regarded as prohibiting the removal of a

person who is a refugee from the country of his nationality to a third country in the face of an alleged danger that the authorities in that third country will send him home to face the persecution he fears.

My Lords, I can well see that if a person arrives in the United Kingdom from country A claiming to be a refugee from country B, where country A is itself a party to the Convention, there can in the ordinary case be no obligation on the immigration authorities here to investigate the matter. If the person is refused leave to enter the United Kingdom, he will be returned to country A, whose responsibility it will be to investigate his claim to refugee status and, if it is established, to respect it. This is, I take it, in accordance with the "international practice" of which Mr. McDowall speaks in his affidavit. The practice must rest upon the assumption that all countries which adhere to the Convention may be trusted to respect their obligations under it. Upon that hypothesis, it is an obviously sensible practice and nothing I say is intended to question it. It is not, however, difficult to imagine a case where reliance on the international practice would produce the very consequence which the Convention is designed to avoid, i.e. the return of refugees to the country where they will face the persecution they fear. Suppose it is well known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following their escape across the border. Against that background, if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of article 33 of the Convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i.e. his return "to the frontiers of territories where his life or freedom would be threatened."

For the sake of illustration, I have necessarily taken cases at opposite ends of a spectrum. In the ordinary case of a person arriving here, from a third country, and claiming asylum as a refugee from the country of his nationality, there will be no ground to apprehend that his removal to the third country whence he comes would put him at risk. But at the other end of the spectrum, the risk may be obvious. Between these two extremes there may be varying degrees of danger that removal to a third country of a person claiming refugee status will result in his return to the country where he fears persecution. If there is some evidence of such a danger, it must be for the Secretary of State to decide as a matter of degree the question whether the danger is sufficiently substantial to involve a potential breach of article 33 of the Convention. If the Secretary of State has asked himself that question and answered it negatively in the light of all relevant evidence, the court cannot interfere.

With these considerations in mind, I return to consider the evidence. Whatever doubts I may entertain as to the sufficiency of the interview by the immigration officer on 27 January 1983 as a basis for subsequent decisions by the Secretary of State, I recognise that the initial decision in March 1983 to return the appellant to the "safe country" from which he had come, could not be faulted. The point in the story at which I first

find grounds to entertain serious doubts as to the basis of the decision, is in the reply by the Minister of State on 5 October 1983 to the representations by Mr. Stuart Holland M.P. In Mr. Rose's letter of 30 July 1983, a senior diplomatic representative of Kenya was reported as stating quite categorically that, if returned to Kenya without permission to enter, the appellant would be removed to Uganda. There is no indication that the Home Office, either directly or indirectly, made any inquiry to verify or controvert this statement or to ascertain whether it was qualified by reference to any possible claim for asylum in Kenya. The statement remains uncontroverted save by implication by the statement in the Minister of State's letter that Kenya is a signatory to the Convention and "would not knowingly remove a Ugandan citizen to Uganda if there was reason to believe he would be persecuted there."

Even at this stage, however, it would be difficult not to accept the statement by the Minister of State in his letter, effectively repeated in the concluding passage of Mr. McDowall's affidavit, that the appellant's removal to Uganda was "unlikely" as a sufficient and unchallengeable answer to the relevant question which the Secretary of State was bound to ask himself. But it is to be noted in each case that the essential foundation for the assessment was the expressed confidence in Kenya's observation of its obligations under the Convention.

It is the additional evidence filed on behalf of the appellant in October 1984 directly alleging breaches by Kenya of the Convention by the return to Uganda of Ugandan refugees, and more particularly the reply to that evidence filed on behalf of the Seretary of State, which put a different complexion on the matter. The affidavit of Mr. Handley is at worst self-contradictory, at best, ambiguous. He asserts "the respondent's belief" that Kenya, as a signatory to the Convention, "would not knowingly" return Ugandan refugees to Uganda. But the very next sentence seems to amount to an admission that Ugandan refugees have been returned to Uganda by Kenya. If this is not the meaning, I do not understand the relevance, in the context, of the statement that "it has been the case that Kenya has returned Ugandan nationals to Uganda in the past," still less why this should have led to representations to the Kenyan government by the U.N.H.C.R. The inference one is entitled to draw from this obscurely drafted affidavit is that Kenya has at some unspecified time in the past been guilty to an unspecified extent of returning Ugandan refugees to Uganda in breach of article 33 of the Convention and that the breaches were at least sufficient to evoke a protest from the U.N.H.C.R. The reaffirmed belief of the Secretary of State that Kenya "would not knowingly" act in breach of the Convention may perhaps be referable to the Kenyan government's response to the protest "confirming its position as a signatory" to the Convention.

However that may be, I cannot escape the conclusion that the Secretary of State's decisions in relation to the appellant were taken on the basis of a confidence in Kenya's performance of its obligations under the Convention which is now shown to have been, at least to some extent, misplaced. Since Mr. Handley's affidavit does not condescend to particularity we do not know when Kenya's breaches of article 33 in respect of Ugandan refugees occurred or when they came to the

attention of the Home Office. The fact of such breaches must be very relevant to any assessment of the danger that the appellant, if returned to Kenya, would be sent home to Uganda. Since the decisions of the Secretary of State appear to have been made without taking that fact into account, they cannot, in my opinion, now stand.

In point of form the only relief sought by the appellant in his notice of application under R.S.C., Ord. 53, r. 3(2) is an order to quash the removal orders dated 12 March 1983, 13 July 1983 and 16 January 1984. Those orders directed the appellant's removal to Kenya by specified flights on dates now long past. It may be that, even if the appeal had failed, the Secretary of State would have felt obliged to reconsider the issue of the propriety of returning the appellant to Kenya in circumstances which may have changed radically after the lapse of three years. But for the reasons I have given I am of the opinion that the appeal should be allowed and the orders formally quashed.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Bridge of Harwich and Lord Templeman. I agree with them, and for the reasons which they give I would dismiss the first three appeals and allow the fourth.

Lord Templeman. My Lords, section 1(1) of the Immigration Act 1971 provides that patrials, i.e. persons having the right of abode in the United Kingdom, shall be free to live in, and to come into the United Kingdom without let or hindrance, but by section 1(2) all other persons:

> "may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; . . ."

By section 3(1) a person who is not patrial:

> "(*a*) . . . shall not enter the United Kingdom unless given leave to do so in accordance with this Act; [and] (*b*) . . . may be given leave to enter . . . or . . . remain in the United Kingdom . . . either for a limited or for an indefinite period; . . ."

By section 3(2) the Secretary of State shall from time to time lay before Parliament statements of the rules laid down by him as to the practice to be followed in the administration of the Act for regulating the entry into and stay in the United Kingdom of persons required to have leave to enter.

By section 4(1) the power to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers and the power to give leave to remain in the United Kingdom shall be exercised by the Secretary of State. By section 4(2) the provisions of Schedule 2 to the Act shall have effect with respect to the appointment and powers of immigration officers, the examination of persons arriving in or leaving the United Kingdom, the exercise by immigration officers of their powers in relation to entry into the United Kingdom, the removal from

the United Kingdom of persons refused leave to enter or entering or remaining unlawfully, and the detention of persons pending examination or pending removal from the United Kingdom.

By paragraph 1 of Schedule 2, immigration officers for the purposes of the Act shall be appointed by the Secretary of State and shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given to them by the Secretary of State. By paragraph 2, an immigration officer may examine any person who has arrived in the United Kingdom, and by paragraph 8 where a person is refused leave to enter, an immigration officer may give directions for his removal from the United Kingdom. By paragraph 9, an immigration officer may direct the removal from the United Kingdom of an illegal entrant. By paragraph 10, powers of removal are also given to the Secretary of State. By paragraph 16 and 21, any person liable to be examined or removed, may either be detained or temporarily admitted to the United Kingdom.

Sections 13 to 21 of the Act of 1971 enable any person refused leave to enter or directed to be removed from the United Kingdom to appeal to an adjudicator and from the adjudicator to an appeals tribunal but save in specific and limited cases not material in these proceedings, a person is not entitled to appeal so long as he is in the United Kingdom.

The restrictions and limitations imposed by the Act of 1971 on entry into and stay in the United Kingdom create a control and regulation of individuals and numbers by the decisions of the immigration authorities, i.e. immigration officers and the Secretary of State. An appeal from a decision lies only to an adjudicator and an appeal tribunal established by the Act, and then only if the appellant has left the United Kingdom. This is not surprising. The numbers of appellants and possible appellants would not permit all appellants to be released into the United Kingdom or detained pending the completion of the appellate process. If it is necessary to control entry into the United Kingdom, immediate effect must in general be given to the decisions of the immigration authorities unless in any individual case the immigration authorities direct otherwise, if such control is not to break down.

The Act of 1971 does not allow the courts of this country to participate in the decision-making or appellate processes which control and regulate the right to enter and remain in the United Kingdom. This also is not surprising. Applications for leave to enter and remain do not in general raise justiciable issues. Decisions under the Act are administrative and discretionary rather than judicial and imperative. Such decisions may involve the immigration authorities in pursuing inquiries abroad, in consulting official and unofficial organisations and in making value judgments. The only power of the court is to quash or grant other effective relief in judicial review proceedings in respect of any decision under the Act of 1971 which is made in breach of the provisions of the Act or the rules thereunder or which is the result of procedural impropriety or unfairness or is otherwise unlawful.

The appellants are not patrial. Three of them are illegal entrants liable to be removed from the United Kingdom under the Act of 1971. The appellant, Mr. Musisi, has been refused leave to enter the United

Kingdom and is also liable to be removed under the Act. The appellants are entitled to appeal to an adjudicator or an appeals tribunal once they have been removed from the United Kingdom but this appellate procedure is useless to them because they all seek to remain in the United Kingdom on the grounds that they fear persecution if they are removed from the United Kingdom. Nevertheless, the courts remain powerless to intervene unless the appellants demonstrate that they are entitled to the protection afforded by the process of judicial review.

The United Kingdom is a signatory to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. Article 1 of the Convention defines a refugee as a person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Each of the appellants claims to be a refugee. By article 33 of the Convention, the United Kingdom as a signatory to the Convention, has undertaken not to return:

> "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

By the Act of 1971, a person who is not patrial but claims to be a refugee must nevertheless obtain leave from the immigration authorities to enter or remain in the United Kingdom and is liable to be removed from the United Kingdom if the immigration authorities do not accept his claim to be a refugee.

By paragraph 73 of the Statement of Changes in Immigration Rules (1983) (H.C.169) laid before Parliament on 9 February 1983 under section 3(2) of the Act of 1971:

> "Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of Refugees."

Paragraph 16 directs that where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol and nothing in the rules is to be construed as requiring action contrary to the United Kingdom's obligations under those instruments.

It follows that any claim by a person to enter or remain in the United Kingdom on the grounds that he is a refugee must be carefully considered and decided by the Secretary of State. No appeal from the decision of the Secretary of State denying refugee status lies to the courts and no effective appeal lies to the adjudicator or appeals tribunal established by the Act if the person claiming refugee status is denied that status by the Secretary of State and is removed pursuant to the provisions of the Act of 1971 to the country where, contrary to the view formed by the Secretary of State, he is in fact in danger of persecution.

The claims of the first three appellants to be refugees have been considered and rejected by the Secretary of State and orders have been made for their removal from the United Kingdom. Mr. Musisi claims to be a refugee but has been refused leave to enter the United Kingdom and his removal has been ordered. The appellants now claim judicial review of the orders for their removal.

The first three appellants contend that the court is entitled and bound to decide whether they are refugees protected by the Convention and the Protocol but this contention is inconsistent with the Act of 1971 which entrusts to the immigration authorities the right and duty to determine whether any person who is not patrial shall be given leave to enter or remain in the United Kingdom.

In the alternative, these appellants contend that they are entitled to remain in the United Kingdom until their right to refugee status has been considered by the adjudicator and appeal tribunal system created by the Act of 1971. This contention is inconsistent with sections 13(3) and 16(2) which in the present circumstances deny the appellants power to appeal so long as they are in the United Kingdom.

My noble and learned friend, Lord Bridge of Harwich, has dealt in more detail with the contentions adopted by the appellants. The actions of a statutory decision-making body may be controlled by the court in judicial review proceedings if there has been a defect in the decision-making process. In the case of Mr. Musisi but not in the case of any of the other appellants, the evidence discloses that there may have been such a defect. The action of an authority entrusted by Parliament with decision-making can be investigated by the court:

> "with a view to seeing whether they have taken into account matters which ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account": *per* Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, 233–234.

In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process. In the case of Mr. Musisi, a first reading of the evidence filed on behalf of the Secretary of State and Mr. Musisi,

gives rise to a suspicion that the dangers and doubts involved in sending Mr. Musisi back to Kenya have not been adequately considered and resolved. As a result of the analysis of the evidence undertaken by my noble and learned friend, Lord Bridge of Harwich, I am not satisfied that the Secretary of State took into account or adequately resolved the ambiguities and uncertainties which surround the conduct and policy of the authorities in Kenya. With relief I gratefully concur in the reasoning of my noble and learned friend, Lord Bridge of Harwich, and agree that the orders made in respect of Mr. Musisi should be quashed. The appeals of the other appellants against the refusal of the Court of Appeal and the Divisional Court to quash the orders made against them must be dismissed.

Lord Griffiths. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree that for the reasons he gives the first three appeals should be dismissed and the fourth appeal allowed.

Lord Goff of Chieveley. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree that for the reasons he gives the first three appeals should be dismissed and the fourth appeal allowed.

Appeals of Bugdaycay, Nelidow Santis and Norman dismissed.
Appeal of Musisi allowed.
Secretary of State to pay Musisi's costs.
Order for legal aid taxation.

Solicitors: Winstanley-Burgess; Fisher Meredith & Partners; Treasury Solicitor.

C. T. B.

[HOUSE OF LORDS]

MILES . . . . . RESPONDENT

AND

WAKEFIELD METROPOLITAN DISTRICT COUNCIL APPELLANTS

1986 June 3, 4, 5; Dec. 9, 10;
1987 March 12

Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Brightman, Lord Templeman and Lord Oliver of Aylmerton

Crown—Servant—Duties, performance of—Superintendent registrar appointed by local authority—Superintendent registrar refusing to conduct Saturday weddings—Whether in breach of statutory duty—Whether local authority entitled to make deductions from remuneration—Superintendent registrar office-holder—Whether salary honorarium for mere tenure of office—Registration Service Act 1953 (1 & 2 Eliz. 2, c. 37), ss. 6, 13(2) (as amended by Local Government Act 1972 (c. 70), Sch. 29, para. 41)

Employment—Contract of employment—Incidents of contract—Salary or wages—Deduction in respect of employee's non-performance of duties—Whether lawful—Superintendent registrar appointed by local authority—Superintendent registrar refusing to conduct Saturday weddings—Whether local authority entitled to make deductions from remuneration—Registration Service Act 1953, ss. 6, 13(2) (as amended)

In 1974, the defendant council, pursuant to section 6 of the Registration Service Act 1953[1], appointed the plaintiff a superintendent registrar of births, deaths and marriages for their registration district. The local scheme, made pursuant to section 13 of the Act, assimilated a superintendent registrar with an appropriate local government officer in relation to, inter alia, salary scales. The plaintiff's normal working week consisted of 37 hours including three hours on Saturday morning, which was the most popular time for civil weddings. In 1981, the plaintiff's trade union instructed all superintendent registrars to take industrial action involving, inter alia, refusing to conduct weddings on Saturdays. The plaintiff complied with that instruction. He remained willing to work a 37-hour week and to attend his office on Saturdays to do other work, but the council by letter dated 8 October 1981 made it clear that while registration officers were not prepared to undertake the full range of their duties on Saturdays they were not required to attend for work on Saturdays and accordingly would not be paid. The industrial dispute ended in October 1982. The council between August 1981 and October 1982 deducted $^{3}/_{37}$ths from the plaintiff's salary representing the three hours appertaining to Saturdays, totalling £774. The plaintiff's action for £774 with interest was dismissed by Nicholls J. The Court of Appeal allowed an appeal by the plaintiff.

On appeal by the council:—

Held, allowing the appeal, that, although the plaintiff was not a servant of the defendant council under a contract of

[1] Registration Service Act 1953, s. 6: see post, p. 555B–C.
S. 13(2): see post, p. 555D–E.

employment but the holder of an office, his position was similar to that of an employee and for the purposes of the appeal there was no logical distinction between them, the plaintiff's salary not being an honorarium for the mere tenure of an office; that an employee's right to remuneration depended on his doing or being willing to do the work that he was employed to do and if he declined to do that work the employer need not pay him; and that the defendant council had been entitled to deduct the sums in question from the plaintiff's salary in view of his refusal to work on Saturday mornings in accordance with his duty (post, pp. 551H—552B, E, F–H, 556H—557A, C–D, 561A–B, 564G—565B, F–G, 567E—568E, 574D–E, 575F—576A).

Per Lord Brightman and Lord Templeman. The worker whose industrial action takes the form of "going slow" cannot claim that he is entitled to his wages under the contract because he is deliberately working in a manner designed to harm the employer but he will be entitled to be paid on a quantum meruit bases for the amount and value of the reduced work performed and accepted (post, pp. 553C–D, 561E–F).

Per Lord Bridge of Harwich. It is difficult to understand the basis on which, in such a case, the employee in place of remuneration at the contractual rate would become entitled to a quantum meruit (post, p. 552C–D).

Decision of the Court of Appeal [1985] 1 W.L.R. 822; [1985] I.C.R. 363; [1985] 1 All E.R. 905 reversed.

The following cases are referred to in their Lordships' opinions:

Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Ch.D. 339, C.A.

Cresswell v. Board of Inland Revenue [1984] I.C.R. 508; [1984] 2 All E.R. 713

Cuckson v. Stones (1858) 1 E. & E. 248

Graham (Alexander) & Co. v. United Turkey Red Co. Ltd., 1922 S.C. 533

Hanak v. Green [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141, C.A.

Hanley v. Pease & Partners Ltd. [1915] 1 K.B. 698, D.C.

Healey v. Société Anonyme Française Rubastic [1917] 1 K.B. 946

Henthorn v. Central Electricity Generating Board [1980] I.R.L.R. 361, C.A.

Johnston v. Robertson (1861) 23 D. 646

Laurie v. British Steel Corporation (unreported), 23 February 1978, Outer House of Court of Session

McClenaghan v. Bank of New Zealand [1978] 2 N.Z.L.R. 528

Marrison v. Bell [1939] 2 K.B. 187; [1939] 1 All E.R. 745, C.A.

Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd. [1974] A.C. 689; [1973] 3 W.L.R. 421; [1973] 3 All E.R. 195, H.L.(E.)

Mondel v. Steel (1841) 8 M. & W. 858

Morgan & Son Ltd. v. S. Martin Johnson & Co. Ltd. [1949] 1 K.B. 107; [1948] 2 All E.R. 196, C.A.

National Coal Board v. Galley [1958] 1 W.L.R. 16; [1958] 1 All E.R. 91, C.A.

Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827; [1980] 2 W.L.R. 283; [1980] 1 All E.R. 556, H.L.(E.)

Ramsden v. David Sharratt and Sons Ltd. (1930) 35 Com.Cas. 314, H.L.(E.)

Sim v. Rotherham Metropolitan Borough Council [1987] Ch. 216; [1986] 3 W.L.R. 851; [1986] I.C.R. 897; [1986] 3 All E.R. 387

Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361; [1966] 2 W.L.R. 944; [1966] 2 All E.R. 61, H.L.(E.)
Turnbull v. M'Lean & Co. (1874) 1 R. 730
Welbourn v. Australian Postal Commission [1984] V.R. 257
Williams v. North's Navigation Collieries (1889) Ltd. [1906] A.C. 136, H.L.(E.)

The following additional cases were cited in argument:

Aries Tanker Corporation v. Total Transport Ltd. [1977] 1 W.L.R. 185; [1977] 1 All E.R. 398, H.L.(E.)
Barthorpe v. Exeter Diocesan Board of Finance [1979] I.C.R. 900, E.A.T.
Bolton v. Mahadeva [1972] 1 W.L.R. 1009; [1972] 2 All E.R. 1322, C.A.
Boone v. Eyre (1779) 1 H.Bl. 273n.
Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716; [1985] 3 W.L.R. 1027; [1985] 3 All E.R. 585, Mann J. and C.A.
British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd. [1980] Q.B. 137; [1979] 3 W.L.R. 451; [1979] 2 All E.R. 1063
Chawner v. Cummings (1846) 8 Q.B. 311
Dunlop v. Woollahra Municipal Council [1982] A.C. 158; [1981] 2 W.L.R. 693; [1981] 1 All E.R. 1202, P.C.
Flarty v. Odlum (1790) 3 Durn. & E. 681
Gorse v. Durham County Council [1971] 1 W.L.R. 775; [1971] 2 All E.R. 666
Gould v. Webb (1855) 4 E. & B. 933
Hunkin v. Siebert (1934) 51 C.L.R. 538
Hutchinson v. Harris (1978) 10 B.L.R. 24, C.A.
Liverpool Corporation v. Wright (1859) 28 L.J. Ch. 868
London Transport Executive v. Clarke [1981] I.C.R. 355, C.A.
Moriarty v. Regent's Garage and Engineering Co. Ltd. [1921] 1 K.B. 423, D.C.; [1921] 2 K.B. 766, C.A.
Palmer v. Vaughan (1818) 3 Swan. 173
Reg. v. Barrett (George) [1976] 1 W.L.R. 946; [1976] 3 All E.R. 895, C.A.
Sagar v. H. Ridehalgh and Son Ltd. [1931] 1 Ch. 310, C.A.
Scottish North-Eastern Railway Co. v. Napier (1859) 21 D. 700
Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] I.C.R. 19; [1972] 2 All E.R. 949, C.A.
Slingsby's Case (1680) 3 Swan. 178n.
Temper v. McLachlan (1806) 2 Bos. & Pul. (N.S.) 136
Thomas v. University of Bradford [1986] Ch. 381; [1986] 2 W.L.R. 111; [1986] I.C.R. 87; [1986] 1 All E.R. 217, C.A.
United Scientific Holdings Ltd. v. Burnley Borough Council [1978] A.C. 904; [1977] 2 W.L.R. 806; [1977] 2 All E.R. 62, H.L.(E.)
Wallwork v. Fielding [1922] 2 K.B. 66, C.A.
Wells v. Foster (1841) 8 M. & W. 149
White and Carter (Councils) Ltd. v. McGregor [1962] A.C. 413; [1962] 2 W.L.R. 17; [1961] 3 All E.R. 1178, H.L.(Sc.)

APPEAL from the Court of Appeal.

This was an appeal by the defendants, the Wakefield Metropolitan District Council, by leave of the House of Lords from the decision of the Court of Appeal (Eveleigh, Fox and Parker L.JJ.) [1985] 1 W.L.R. 822 given on 8 February 1985 allowing an appeal by the plaintiff, Henry Gladstone Miles, from the judgment of Nicholls J.

[1984] I.C.R. 332 given on 9 November 1983. By his judgment, Nicholls J. dismissed an action by the plaintiff claiming against the council £774·06 with interest as money had and received by the council to the plaintiff's use or as a debt owed by the council to the plaintiff.

The Court of Appeal refused the council leave to appeal from their decision, but the Appeal Committee of the House of Lords [1985] 1 W.L.R. 822, 839, on 1 April 1985 allowed a petition by the council for leave.

The facts are set out in the opinion of Lord Templeman.

Alexander Irvine Q.C. and *Michael R. Taylor* for the council. Summarising its submissions, the council makes two basic propositions. (1) A superintendent registrar's salary is not a reward for tenure of a statutory office but a salary of remuneration for discharging the duties of that office. (2) His right to remuneration is not unqualified but may be subject to deduction in respect of periods when he is not duly carrying out his statutory duty.

The council seeks to make (1) and (2) good by developing 11 distinct arguments. *On 1:* (a) the registrar is appointed by the local authority (Registration Service Act 1953, section 6(1)) and is a salaried officer (section 6(3)) paid by the council. (b) (an important point based on the history of the legislation). The change in 1929 (Local Government Act) from a fee-based system to a salaried system strongly supports the proposition that the salary is a reward for services rendered and not for mere tenure of the office. Before the Act of 1929 the fees were paid for particular items of work done. There is no reason to suppose that after 1929 the salary was not for work done but had become payable for mere tenure of the office. It was fees for work done before, salary for work done after. No such radical change as to payment for mere tenure of the office was intended. The purpose of the change from fees to salary was to give registrars the security of a salary so as to eliminate difficulties in fee-based incomes that necessarily varied according to the volume of business in particular geographical areas. There is no reason why, as a quid pro quo for the security of a salary, the registrar should not be subject to the liability of deduction when he fails duly to perform his statutory duty. (c) Under statutory schemes the local authority has a duty to fix the registrar's "salary and other remuneration" (section 13(2)(*e*)). Both words in their ordinary dictionary and legal meaning mean a financial reward for services rendered. (d) (this is not necessary for the success of proposition (1) but is correct). The local authority also fixes "the conditions on which an office is to be held" (section 13(2)(*f*)). It has the power to terminate tenure of the office for serious breach of the conditions on which it is held and that it has fixed. That power coexists with the express residual power of the Registrar General to remove the registrar from office where he is in serious default in the performance of his statutory duties (section 13(2)(*f*), and section 6(4) is equally relevant). If the local authority did not have these powers, it would no longer be fixing the conditions on which the office is "to be" held, which it is the local authority's duty to fix, but would be compelled to condone breaches of those conditions where the Registrar General

A did not remove the registrar. (d) The coexistence of these two powers is supported by the structure of the Act of 1953. (e) (a lesser point). The proper officer's (i.e. the local authority's officer's) power of supervision over the registrar (s. 13(2)(*h*)) suggests the availability of disciplinary sanctions to back up his power of control. (f) (a broader point). It is unlikely that Parliament intended a system so inflexible (and so remote from local control) that the only sanction for a refusal by the registrar to B perform his statutory duty would be dismissal (and that by the Registrar General only). It is unlikely that Parliament intended that the sanction should be dismissal only in the context of a national service where the public could be seriously inconvenienced by collective action but in practice the inconvenience might only be exacerbated by the dismissal of the entire service. (g) There were local (statutory) schemes under the C Act of 1929 just as there are under the Act of 1953. They are couched in language that strongly suggests that the registrar's remuneration was a salary for services rendered. Those local schemes followed a model provided by the Registrar General's office. They had to be approved by the Minister under the Act of 1929 (section 24). The effect of section 22(3) of the Act of 1953 is to deem pre-1953 Act schemes to be D approved by the Minister so that they need not be further approved under section 14. The Act of 1953 should be construed in that context. The draftsman must have known what the pre-Act schemes embodied.

(h) (this is a bridge between propositions (1) and (2) and refers as much to (1) as to (2)). Since salary is for services rendered, the common law should be followed where the registrar has been guilty of a substantial failure to carry out his duty.

E The arguments that follow are in an area of legal controversy. It is possible to determine this appeal on Eveleigh L.J.'s basis without going further, and it should be so determined.

On 2: (i) Work is a precondition of the right to remuneration in a contract of employment. Where there has been substantial non-performance the employer has the right to withhold his performance, F viz. payment. The council is entitled to reopen the question whether there is a contract of employment here. It is not a contract for services but a contract of service or a contract sui generis. Submission (i) is supported by authority of long standing. (j) (a point of importance). In *Sim v. Rotherham Metropolitan Borough Council* [1987] Ch. 216 Scott J. was concerned to demonstrate, and held, that the employer's only G option in such circumstances was to terminate the contract for repudiatory breach and that he might not withhold his own performance. A distinction to the like effect was drawn by Parker L.J. in the present case. Counterclaim and equitable set-off are available; the council does not dispute that, but there is a massive difference: who is to be the plaintiff and who the defendant, and where is the burden of proof? There is no distinction between a breach of repudiatory character H and substantial non-performance. The employer could withhold the employee's salary for the day on which he refuses to work; he could also dismiss him. The obligations to work and to pay are interdependent. (k) The Apportionment Act 1870 applies to all salaries and employment.

The legislative history of the registration service is relevant to the construction of the Act of 1953 and the local scheme for two principal reasons: (i) the Act of 1953 is principally a consolidating enactment; and (ii) the saving provisions of section 22(1) and (3) of the Act of 1953. The Act of 1929 did not effect a radical change. Before and after, the registrar received remuneration for services rendered: see the Act of 1929, section 22. The Act of 1929 was not intended to improve the conditions of registrars by giving them the right to receive salary whether or not they performed their duties. "Salary" means payment for services rendered: the corollary is that if full services are not rendered full payment is not due. The evidential burden of establishing that an entitlement to salary had accrued rested on the plaintiff.

It is incorrect that only the Registrar General can dismiss a superintendent registrar. The coexistence of two powers is perfectly rational: to enable the Registrar General to exercise supervisory control at national level (he is specifically concerned to see that the registrar's statutory duties are fulfilled), whereas the local authority is concerned with the machinery for the discharge of the registration service. On this, the following points are made: (i) the local authority selects and appoints (section 6(1)); (ii) it determines the number of registrars (section 13(2)(*c*)); (iii) it fixes the hours of work (section 13(2)(*h*)(i)), (iv) it controls the distribution of business (section 13(2)(*h*)(ii)); (v) it fixes the salaries (section 13(2)(*e*)); (vi) through the proper officer it supervises the machinery (section 13(3)(*c*)).

The Act of 1953 itself authorised the deduction made from the plaintiff's salary by the council, but alternatively, since "salary" in the context of this Act is for services rendered, there is no reason why the common law should not be followed. By analogy with a salaried officer, it would be natural to take a common law analysis. In *Barthorpe v. Exeter Diocesan Board of Finance* [1979] I.C.R. 900 Slynn J. held that the holding of an office did not necessarily preclude the existence of a contract of service, which might be subject to additional contractual conditions.

The authorities support the proposition that a substantial failure by the employee in an important respect to perform his obligations under his contract of service amounts to a failure by him to satisfy a precondition of the employer's obligation to pay his wages. The question of principle here is to identify a case in which the plaintiff failed in limine as distinct from cases where he did not fail in limine but the employer still had a counterclaim or set-off. The proposition that one gets from the authorities regarding conditions precedent is that a condition precedent to the employer's obligation to pay wages under the contract of employment is the employee's performance of his promise to do the work. If a workman does not turn up on Monday, that would be a failure to comply with a condition precedent rather than just a total failure of consideration.

[Reference was made to *Treitel, The Law of Contract,* 6th ed. (1983), pp. 569–570, 572; *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888) 39 Ch.D. 339, 364–365 (Bowen L.J.); *Cresswell v. Board of Inland Revenue* [1984] I.C.R. 508; *Laurie v. British Steel Corporation*

(unreported), 23 February 1978; *Turnbull v. M'Lean & Co.* (1874) 1 R. 730; *Scottish North-Eastern Railway Co. v. Napier* (1859) 21 D. 700; *Johnston v. Robertson* (1861) 23 D. 646; *Alexander Graham & Co. v. United Turkey Red Co. Ltd.*, 1922 S.C. 533; *Henthorn v. Central Electricity Generating Board* [1980] I.R.L.R. 361; *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455, *per* Lord Denning M.R., at pp. 491E–492E.] Where there is a breach of a repudiatory character, the contract can remain alive (there is no need to accept the repudiation) and the innocent party is entitled to withhold his performance. [Reference was made to *Gorse v. Durham County Council* [1971] 1 W.L.R. 775 and *Hanley v. Pease & Partners Ltd.* [1915] 1 K.B. 698.]

The conclusion of Fox and Parker L.JJ. that the plaintiff's right to salary was unqualified is irreconcilable with the provisions of the Act and the local scheme for the following reasons. (Determination of the nature of the plaintiff's statutory office does not, as they thought, provide a conclusive answer to the question.) (i) It obviates the need for section 13(2)(*f*) of the Act and renders the imposition of the scheme of conditions of service under article 12(3) of the local scheme ultra vires in so far as the scheme prejudices the plaintiff's unqualified right to his salary. (ii) It negates the intention of sections 6(3) and 13(2)(*e*), (*f*) and (*g*) of the Act of articles 5, 10(1) and 12(3) of the local scheme in so far as those provisions assimilate the plaintiff into the council's service for the purpose of remuneration. (iii) It is inconsistent with the concept of "whole time service" in article 5(1)(*a*) of the local scheme. (iv) It is inconsistent with the provisions of section 8(1) of the Act and article 10 of the local scheme whereby the council is obliged to remunerate any person who deputises for the plaintiff. (v) The provisions of sections 16 and 18 of the Act do not enable an office-holder remunerated by fees to claim such fees unless the duties are discharged.

Further, the transitional provisions in Part II and sections 122 and 123 of the Act of 1929 whereby registration officers formerly remunerated by fees paid out of the Consolidated Fund and by the general public on the discharge of duties respectively to the Registrar General and the general public were instead paid a salary by local authorities from fees and local rates were not intended so to change the status of registration officers that they thereafter enjoyed an unqualified entitlement to such salary whether or not they discharged their statutory duties.

Eveleigh L.J. [1985] 1 W.L.R. 822, 838 correctly adopted the definition of "salary" in *Stroud's Judicial Dictionary* when construing the words "a salaried officer" in section 6(3) and the word "salary" in section 13(2)(*e*) of the Act of 1953.

The plaintiff's salary is an annuity as defined in section 5 of the Act of 1870 and by the provisions of section 2 of that Act accrues from day to day and is apportionable in respect of time.

A construction of the Act and the local scheme which denies the council a power to refuse payment of salary in circumstances such as these is contrary to public policy and cannot have been intended.

By analogy with contractual principles, a party to a divisible contract for services, where the payment for the services rendered is apportionable

from day to day, cannot in circumstances such as these rely on partial performance and claim either on a quantum meruit basis or the full remuneration subject to a set-off for damages, because; (i) the services rendered were not voluntarily accepted as a discharge of the contractual promise; albeit (ii) further service was not prevented by the payor; (iii) there was no implied promise to pay for services actually rendered on a quantum meruit basis; (iv) even if the doctrine of substantial performance does apply to a divisible contract it should not assist where the failure to render services was designed to encourage the payor to renegotiate the agreed remuneration.

Stephen Sedley Q.C. and *Antony White* for the plaintiff. That the office held by the plaintiff is an office under the Crown or a public office, notwithstanding that the local authority makes the appointment and pays the salary, is clear both from the terms of the statute and from the decision of the Court of Appeal in *Reg. v. Barrett (George)* [1976] 1 W.L.R. 946. By virtue of section 6(4) of the Act of 1953, the sole power of dismissal from office vests in the Registrar General. No other and lesser disciplinary sanction is either expressly or impliedly provided. The limit of the supervisory powers that may be enacted in a local scheme is set out in section 13(3) of the Act: it is restricted to "supervising the administration" of the legislation. In any event, there is no evidence or finding in the present case that any material step or fact derived from the exercise of this power.

Even if article 13(1)(*b*) of the Wakefield scheme gave the proper officer a power of direction, and even if such a direction lawfully given by him was disregarded by the plaintiff, no right or power to penalise the plaintiff for disobedience or otherwise to respond by docking his salary is expressly or impliedly conferred by the Act. The limit of the proper officer's power is to bring any allegation of misconduct to the attention of the Registrar General. In the case of disobedience to orders, everything points away from the local authority and the proper officer to the Registrar General as the person having authority.

Neither the local scheme nor any other delegated legislation is an aid to the construction in the Act or can alter its meaning or ambit.

The provision in section 6(3) of the Act that every superintendent registrar shall be a salaried officer paid by the council is historically explained by the fact that before 1929 registrars were, and during the "hybrid period" until 1953 they might be, remunerated by fees. The Act terminated all fee income for registrars and provided that they should all be salaried. The phrase "paid by the council" makes it clear that the registrar is not to be an officer *of* (and therefore subordinate to) the council.

The Act of 1870, which was not pleaded by the council nor relied on by them below, has no bearing on the foregoing propositions. Essentially, it enables money to be paid by the day, although calculated by reference to a longer period, if independently of the statute the right to be paid has determined within the period of measurement. It is not logically or legally possible to quantify the plaintiff's breach of statutory duty as three-thirty-sevenths of his salary, since for the three hours so represented he was in fact discharging various of his statutory duties. Nor did the

council themselves see the deduction as the quantification of a breach: as is shown by the evidence and was found by Nicholls J. they saw it as an industrial response to industrial action. To translate it into a legal loss of entitlement to salary involves a doctrine and propositions of law going well beyond those hitherto contended for by the council.

The fact that there is, and is conceded to be, no contractual relationship between the parties itself makes any argument from the law of contract inapposite and potentially misleading. Assuming, however, that the plaintiff had been employed the council as a superintendent registrar under a contract of employment the terms of which he had breached by refusing to celebrate marriages on Saturdays, there is no doctrine of law by which the council could have withheld three-thirty-sevenths of his salary. There would have been three possibilities in principle: (i) if the breach was fundamental or was a breach of a "condition" of the contract it was open to the council to accept the repudiatory act by dismissing the plaintiff, thereby disentitling him to further salary and enabling themselves to claim against him any quantifiable damages caused to them by his breach; (ii) alternatively, they could have elected to affirm the contract, resorting again to a claim for any quantifiable damages for the breach; (iii) if the breach was not fundamental, they would have been limited to a like claim. In no case could they have withheld part of the salary any more than the plaintiff was capable of being in partial breach of contract. It follows that, even if it applied, the law of contract would furnish no better basis than the Act for the withholding of the sums of money claimed in this action.

On (1), it is common ground that this is an office. Its function is national, not local: *Reg. v. Barrett (George)* [1976] 1 W.L.R. 946. The Act of 1953 (see especially the provisions for local schemes in sections 13 and 14) is a precise and discrete provision. Essentially, a superintendent registrar is answerable to the Registrar General for the discharge of his duties. The local authority has the role of servicing the system by providing premises and salaries and supervising (not prescribing) the proper running of the system. There is nothing in the Act about a person having a supervisory capacity but no disciplinary powers. [Reference was made to the Registration of Births, Deaths and Marriages Regulations 1968 (S.I. 1968 No. 2049), *Handbook for Registration Officers* (1969), Pt. II, para. 20 and the *Proper Officer's Manual* (1976).] When the local authority exercises its "domestic" role of laying down terms (as to time available, etc.), the conditions are not contractual but conditions made by delegated legislation (the local scheme) under statutory powers and are conditions of the tenure of the office.

For the respective powers of the Registrar General and the local authority, see the Act of 1953, sections 6(1)(2)(3)(4), 7(1)(2)(*b*), 8(1)(2), 9(2), 10(1)(2)(3), 11(2)(3), 12, 13, 14(5)(6), 15(1), 18, 20(*a*)(*b*)(*c*). [Reference was made to *Thomas v. University of Bradford* [1986] Ch. 381.] There has been a general statutory shift over the last 100 years from fee-paying office to salaried office. Historically, the mere fact that the plaintiff is salaried in no way characterises or diminishes the character of his office. [Reference was made to *Moriarty v. Regent's Garage and Engineering Co. Ltd.* [1921] 1 K.B. 423; [1921] 2 K.B. 766.]

Section 22(1) of the Act of 1929 emphasises that this is an office. If a High Court judge took a day off to go to the races, or a year's sabbatical leave, he would still be entitled to his salary. No counterclaim would lie, except for damages if quantifiable. A superintendent registrar is not an employee of the local authority, as a town clerk is. His position is sui generis: it is what is created by this particular statute. There is a distinction between an employer and a paymaster.

The authorities show that salaries, when attached to offices of this kind, are not contractual and not divisible: see *Flarty v. Odlum* (1790) 3 Durn. & E. 681; *Wells v. Foster* (1841) 8 M. & W. 149; *Liverpool Corporation v. Wright* (1859) 28 L.J. Ch. 868; *Hunkin v. Siebert* (1934) 51 C.L.R. 538; *Boston Deep Sea Fishing and Ice Co. v. Ansell,* 39 Ch.D. 339, 352 (Cotton L.J.); *Palmer v. Vaughan* (1818) 3 Swan. 173 and *Slingsby's Case* (1680) 3 Swan. 178n.

To summarise the plaintiff's submissions: (1) a superintendent registrar is the holder of a public office under the Crown, in which the sanction for misconduct or incapacity is dismissal by the Registrar General in right of the Crown: Act of 1953, ss. 1, 5(2), 6(4); *Reg. v. Barrett (George)* [1976] 1 W.L.R. 946. (2) That he is ordinarily appointed to his office by the local authority (s.6(1)) and is paid his salary by them (s.6(3)) does not modify his status in law. The salary is expressed to attach to the office: s.13(2)(*e*). (The local authority does not *fix* the salary: it is negotiated with the local authority and then approved by the Secretary of State.) (3) The salary paid to him, like the emolument of any other office, is the reward for the tenure of the office, not for its discharge. The standard definitions of salary include both "recompense" and "consideration" and are therefore indecisive: see Termes de la Ley quoted at [1985] 1 W.L.R. 822, 838F; *Moriarty v. Regent's Garage and Engineering Co. Ltd.* [1921] 1 K.B. 423, 445. The line of cases starting with *Slingsby's Case,* 3 Swan. 178n. illustrates the unconditional character of a salary attached to an office. More helpful is the history of the present provision. From 1836 payment of superintendent registrars was by fees earned; in 1929 they were given the option of commuting fees for a regular income, viz. a salary; and from 1953 the office became entirely salaried.

(4) Even if the salary is a quid pro quo for the due performance of duties, it is not within the local authority's powers to dock salary for misfeasance. (a) The Act of 1953 itself makes the necessary provision for dealing with breach of duty: see in particular section 13(2)(*f*). To vest separate disciplinary powers in the local authority or the proper officer (which are different entities) would break the statutory chain of responsibility and command. (b) The law provides a distinct remedy for misfeasance in public office: *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716; *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158. It affords damages at large where an office holder causes foreseeable loss to others by a conscious abuse of power. (c) Even if common law and equitable doctrines applicable to the law of contract can be applied here, (i) they do not extend to disciplinary measures not designed to recoup recoverable losses; (ii) they are in any event limited by settled law to two, not three, options: acceptance of

repudiation or affirmation, in either case accompanied by a right to damages for recoverable loss caused by the breach: *London Transport Executive v. Clarke* [1981] I.C.R. 355; *Ramsden v. David Sharratt and Sons Ltd.*, 35 Com.Cas. 314; *Healey v. Société Anonyme Française Rubastic* [1917] 1 K.B. 946 (approved in *Ramsden's* case); *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827, 848 (Lord Diplock); *White and Carter (Councils) Ltd. v. McGregor* [1962] A.C. 413; *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Hanley v. Pease & Partners Ltd.* [1915] 1 K.B. 698; *Wallwork v. Fielding* [1922] 2 K.B. 66. (d) The local authority has conceded throughout that it cannot show any loss to itself consequent on the plaintiff's breach of duty. Its only arguable loss is the potential payment of the proportion of salary referable to Saturday mornings if this claim succeeds; but, even assuming it to be the local authority that is entitled to the benefit of the registration service, it has conceded that from week to week no work went undone that was required to be done.

(5) The discussion of abatement thrown up by the decision of Scott J. in *Sim v. Rotherham Metropolitan Borough Council* [1987] Ch 216 has no direct bearing, the council having expressly disclaimed any reliance on abatement in opening the appeal in the House, both because the doctrine is confined to contracts for chattels or for work and labour and because the council can show no recoverable loss: *Hanak v. Green* [1958] 2 Q.B. 9, 17–19, 23; *Temper v. McLachlan* 2 Bos. & Pul. (N.S.) 136; *Mondel v. Steel* (1841) 8 M. & W. 858, 870; *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.* [1974] A.C. 689; *Aries Tanker Corporation v. Total Transport Ltd.* [1977] 1 W.L.R. 185, 190; *Hutchinson v. Harris* (1978) 10 B.L.R. 24. What the existence and limitations of the doctrine do establish is that there is no right of abatement at large.

(6) The council are not assisted by *Sagar v. H. Ridehalgh and Son Ltd.* [1931] 1 Ch. 310. The unanimous ratio of the Court of Appeal in that case was that the wage due was itself calculated by allowing for bad work, so that the deduction did not contravene the Truck Acts: see *per* Lawrence L.J., at p. 337, and Romer L.J., at p. 343. Lord Hanworth M.R. also adopted this reasoning: see his reference to *Chawner v. Cummings* (1846) 8 Q.B. 311, at p. 327, and his conclusion, at p. 333. Separately, he also founded on what could only be abatement (see his reference to *Mondel v. Steel*, at pp. 324–325) and went on to import it into master and servant contracts. The ratio of the decision does not advance the position beyond (5) above.

(7) The council's stance, therefore, has to be that "no work, no pay" is a principle of English law. As to this: (a) see the reaction of Scott J. in *Sim v. Rotherham Metropolitan Borough Council*, at p. 254E–G. (b) Such a principle would destroy the long-accepted right to sick pay: *Marrison v. Bell* [1939] 2 K.B. 187. (c) A principle of non-payment only applies where there has been a total failure of consideration: *Gould v. Webb*, 4 E. & B. 933. Otherwise, the sole remedy for intermittent breach of a continuing obligation is to quantify and claim damages: *National Coal Board v. Galley* [1958] 1 W.L.R. 16, 27. The reason for

this rule is well explained by Lord Atkinson in *Williams v. North's Navigation Collieries (1889) Ltd.* [1906] A.C. 135, 146. (d) *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455, relied on below by the council, concerned not the nature or effect of a breach but whether the work to rule *was* a breach and therefore "irregular industrial action short of a strike." It did nothing to alter the fundamental rules that "an unaccepted repudiation is a thing writ in water" and that the only remedy for a non-fundamental breach is damages, if damage has been suffered. (e) If mutuality of obligation is the basis of the council's case, how will "no pay, no work" operate? What will be the effect of late payment of wages? (f) The council's test of "substantial non-performance" is an attempt to find a middle road between affirmation and rescission, involving affirmation without due performance *or* damages. If it were the law: (i) decisions like *Sagar v. H. Ridehalgh and Son Ltd.* [1931] 1 Ch. 310 would be otiose; (ii) it would have to apply to any cross-promises, for example for rent and quiet enjoyment, permitting in effect abatement, contrary to all authority (cf. *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904; *British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd.* [1980] Q.B. 137). (g) The council withheld over £3,000 from salaries in the course of this dispute but suffered no loss. They have certainly no better legal entitlement to the money than the plaintiff and others.

(8)(a) An employer, like any other contracting party, cannot affirm the contractual relationship and simultaneously depart from his own obligations under it as of right, except in the specific classes of case where the law modifies his obligation by abatement. (b) The reason lies in the twin doctrines of election and substantial performance. (i) Where the breach is fundamental, the innocent party must elect: *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 395A–C, 419F—420A. (ii) Where there has been substantial performance there can be no election to rescind and the innocent party is limited to damages: the doctrine originates with *Boone v. Eyre,* 1 H.Bl. 273n. and is fully reviewed in *Bolton v. Mahadeva* [1972] 1 W.L.R. 1009. The law offers no third course.

(9) The application of the principles governing both contractual employment and status is well illustrated in *Welbourn v. Australian Postal Commission* [1984] V.R. 257 and *McClenaghan v. Bank of New Zealand* [1978] 2 N.Z.L.R. 528.

(10) On this view, the plaintiff's legal status is recognised; the proper rules of contract are observed; and any damage done by the breach of duty affords a cause of action to whoever suffers by it, rather than being a windfall to the local authority.

Irvine Q.C. in reply. The plaintiff says that he has a legally enforceable right to his salary. The House should give the construction to the statute that that right is in return for services *duly* rendered, otherwise it would be attributing an inconvenient and absurd intention to Parliament. The council may make deduction from the plaintiff's salary for good and reasonable cause. To the extent that services are not duly rendered, payment is not due.

A Alternatively, there is a legal relationship, probably contractual in nature and maybe sui generis if it falls short of a contract of employment, arising out of the offer and acceptance of the plaintiff's employment; see *Sim v. Rotherham Metropolitan Borough Council* [1987] Ch. 216. There is no reason to say that Parliament intended such an office-holder to be less amenable to sanctions than an ordinary employee.

B There may be cases where an employee who is "going slow" provides services to his employer, which the employer accepts out of commercial necessity. In such cases the employee would probably have failed to earn his pay by fulfilling the condition precedent to his right to wages under the contract, but he might be entitled to a quantum meruit for the value of the services in fact provided to the employer. Thus the employer would not get the benefit of the services for nothing. But in C this case the plaintiff can claim no quantum meruit, because although he did in fact do some work on Saturday mornings, the council clearly indicated that it would not accept his services unless he was prepared to work normally.

Their Lordships took time for consideration.

D

12 March. Lord Bridge of Harwich. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Templeman and Lord Oliver of Aylmerton. I agree, for the reasons they give, that the salary payable to the plaintiff by the council was not an honorarium for the mere tenure of an office but had the character of remuneration for work done. The salary was paid for a E working week of 37 hours. The more difficult question at the heart of this appeal is whether the council were entitled, in the circumstances, to deduct and withhold a proportion of the weekly salary corresponding to the three hours of work required to be done on Saturday mornings during the weeks when the plaintiff was refusing to perform his duty of celebrating marriages on Saturdays. This depends, in turn, on whether F in the like circumstances, if there had been a straightforward contract of employment, the employers would have had the right to make such a deduction independently of any set-off of damages for breach of contract. By their letter of 8 October 1981 the council made clear that the partial and imperfect performance of his Saturday duties which the plaintiff was willing to undertake was not acceptable. If he was not prepared to celebrate marriages on Saturdays, which was part of the duty required G by his terms of service, he was not to attend at his office and would not be paid if he did. I regard this attitude manifested by the council as a central feature in the dispute, which serves to narrow and define the question of law falling for decision. If an employee refuses to perform the full duties which can be required of him under his contract of service, the employer is entitled to refuse to accept any partial performance. The position then resulting, during any relevant period H while these conditions obtain, is exactly as if the employee were refusing to work at all. It follows that the central question of law can be stated thus: if an employee, entitled to a weekly salary for a working week of a defined number of hours refuses to work for the whole or part of a

week, is the employer entitled, without terminating the contract of employment and without relying on any right to damages for breach of contract, to withhold the whole or a proportion of part of the week's salary?

My Lords, the penetrating analysis of the authorities undertaken by my noble and learned friend Lord Oliver and the reasoning he bases on that analysis seem to me to lead convincingly to an affirmative answer to this question. I do not believe that any wider question relating to the effect on contractual rights and obligations of industrial action designed to put pressure on employers falls for consideration. Industrial action can take many different forms and there are a variety of options open to an employer confronted by such action. In particular I should, for my part, have preferred to express no opinion on questions arising in the case of an employee who deliberately "goes slow" or otherwise does his work in a less than satisfactory way, when the employer nevertheless acquiesces in his continuing to work the full number of hours required under his contract. There may be no single, simple principle which can be applied in such cases irrespective of differences in circumstances. But I find it difficult to understand the basis on which, in such a case, the employee in place of remuneration at the contractual rate would become entitled to a quantum meruit. This would presuppose that the original contract of employment had in some way been superseded by a new agreement by which the employee undertook to work as requested by the employer for remuneration in a reasonable sum. This seems to me to be contrary to the realities of the situation.

I would allow the appeal.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Oliver of Aylmerton. I agree that for the reasons which they give the appeal should be allowed. Like my noble and learned friend, Lord Oliver, however, I should prefer to reserve my opinion on the question whether an employee engaged in certain kinds of industrial action may be entitled to claim remuneration on a quantum meruit basis for work actually done.

Lord Brightman. My Lords, for the reasons so convincingly expressed by my noble and learned friends Lord Templeman and Lord Oliver of Aylmerton in their speeches, which I have had the privilege of reading in draft, I agree that the plaintiff's action was rightly dismissed by the trial judge. It was rightly dismissed because in an action by an employee to recover his pay it must be proved or admitted that the employee worked or was willing to work in accordance with his contract of employment, or that such service as was given by the employee, if falling short of his contractual obligations, was accepted by the employer as a sufficient performance of his contract. I leave out of account a failure to work or work efficiently as a result of illness or other unavoidable impediment, to which special considerations apply.

If an employee offers partial performance, as he does in some types of industrial conflict falling short of a strike, the employer has a choice.

He may decline to accept the partial performance that is offered, in which case the employee is entitled to no remuneration for his unwanted services, even if they are performed. That is the instant case. Or the employer may accept the partial performance. If he accepts the partial performance as if it were performance which satisfied the terms of the contract, the employer must pay the full wage for the period of the partial performance because he will have precluded or estopped himself from asserting that the performance was not that which the contract required. But what is the position if the employee offers partial performance and the employer, usually of necessity, accepts such partial performance, the deficient work being understood by the employer and intended by the employee to fall short of the contractual requirements and being accepted by the employer as such? There are, as it seems to me, two possible answers. One possible answer is that the employer must pay the full wage but may recover by action or counterclaim or set off damages for breach of contract. The other possible answer is that the employee is only entitled to so much remuneration as represents the value of the work he has done, i.e. quantum meruit. My noble and learned friend Lord Templeman prefers the latter solution, and so do I. My reason is this. One has to start with the assumption that the employee sues for his pay; the employer is only bound to pay the employee that which the employee can recover by action. The employee cannot recover his contractual wages because he cannot prove that he has performed or ever intended to perform his contractual obligations. If wages and work are interdependent, it is difficult to suppose that an employee who has voluntarily declined to perform his contractual work can claim his contractual wages. The employee offers partial performance with the object of inflicting the maximum damage on the employer at the minimum inconvenience to himself. If, in breach of his contract, an employee works with the object of harming his employer, he can hardly claim that he is working under his contract and is therefore entitled to his contractual wages. But nevertheless in the case supposed the employee has provided *some* services, albeit less than the contract required, and the employer has received those (non-contractual) services; therefore the employer must clearly pay something—not the contractual wages because the contractual work has deliberately not been performed. What can he recover? Surely the value of the services which he gave and which the employer received, i.e. quantum meruit.

My Lords, some of my conclusions travel outside the ambit of this case. The fact that they are obiter does not deter me from expressing them. I express my thoughts in the hope that they may, perhaps, be of some assistance to those who seek a correct approach to the rights of the parties in the common case of industrial action which falls short of a withdrawal of labour.

My Lords, I would allow this appeal.

Lord Templeman. My Lords, the respondent plaintiff is the superintendent registrar of births, deaths and marriages for the district of Wakefield. The plaintiff was appointed by the appellant defendants, Wakefield Metropolitan District Council. The plaintiff is paid a salary by

the council, and he works a 37-hour week. One of the most important functions of the plaintiff as superintendent registrar is to conduct civil wedding ceremonies, and the most popular time for such weddings is Saturday morning when the registry office provided by the council is open for three hours between nine o'clock and midday. On instructions from his trade union, N.A.L.G.O., the plaintiff, by way of industrial action, refused to conduct weddings on Saturday morning. The object of the union was, by inconveniencing the public, to obtain publicity and support for the campaign conducted by the union in the interests of its members for a higher scale of salary to be paid to superintendent registrars. The plaintiff remained willing to work a 37-hour week and to work on Saturday but he refused to conduct weddings on Saturday. By a letter dated 8 October 1981, the council:

> "made it clear to the registration officers that whilst ever they are not prepared to undertake the full range of their duties on Saturdays they are not required to attend for work and accordingly will not be paid. If the registrars attend at their offices on Saturdays that is entirely a matter for them."

Thus the council treated the plaintiff as being under a duty to work three out of his 37 hours on Saturday morning for the purpose of conducting weddings if required. The plaintiff refused to conduct weddings on Saturday and the council treated him as working for only 34 hours. In refusing to conduct weddings on Saturday, the plaintiff, as he now frankly concedes, acted in breach of his duties as superintendent registrar. The council deducted $^{3}/_{37}$ths of the salary of the plaintiff while he remained unwilling to conduct weddings on Saturday, between August 1981 and October 1982, when the salary dispute was settled. The plaintiff now seeks payment of the sums deducted, amounting to £774. Nicholls J. decided against the plaintiff. The Court of Appeal by a majority (Parker and Fox L.JJ.) held that the plaintiff was entitled to be paid his full salary unless and until he was dismissed. Eveleigh L.J., dissenting, agreed with Nicholls J. that the plaintiff was not entitled to be paid for the time he refused to work in accordance with his duties. The council now appeal with the leave of the House.

The rights and obligations of the plaintiff derive from the Registration Service Act 1953. The question is whether upon the true construction of the Act of 1953 and the terms of the appointment of the plaintiff, he was entitled to be paid for a Saturday morning when in pursuit of industrial action he was not willing to work normally.

By section 45 of the Marriage Act 1949:

> "(1) Where a marriage is intended to be solemnized on the authority of a certificate of a superintendent registrar, the persons to be married may state in the notice of marriage that they wish to be married in the office of the superintendent registrar . . . to whom notice of marriage is given, and where any such notice has been given . . . the marriage may be solemnized in the said office, with open doors, in the presence of the superintendent registrar . . . and in the presence of two witnesses . . ."

Section 1 of the Act of 1953 created the office of Registrar General for the purposes of the Act of 1949 and the Births and Deaths Registration Act 1953 which regulate the reporting and registration of births and deaths and the conduct and registration of civil marriages. Section 5 of the Act of 1953, as amended by the Local Government Act 1972, created the office of superintendent registrar of births, deaths and marriages for every registration district consisting of or comprised in a non-metropolitan county or metropolitan district. The Act of 1953, as amended, and so far as material for present purposes, also provided:

> "6(1) Every superintendent registrar . . . shall be appointed by the council of the non-metropolitan county or metropolitan district in which his district . . . is situated: . . ."

Pursuant to this provision, the council appointed the plaintiff to be the superintendent registrar for the district of Wakefield.

> "6(3) Every superintendent registrar . . . shall be a salaried officer paid by the council . . . (4) Every superintendent registrar . . . shall hold office during the pleasure of the Registrar General."

Thus the plaintiff is paid by the council but can only be dismissed by the Registrar General.

> "13(1) There shall be in force for each non-metropolitan county and metropolitan district a scheme or schemes (in this Act referred to as 'the local scheme') . . . . (2) Provision shall be made by the local scheme for—. . . (*e*) fixing . . . the salary and other remuneration, if any, to be attached to each office . . . (*f*) fixing . . . the conditions on which an office is to be held, so, however, that nothing in the scheme shall affect the power of the Registrar General to remove from office an officer in any case in which the Registrar General is satisfied that the officer has been guilty of serious default in the performance of the duties imposed on him by the Registration Acts or any regulations made thereunder; . . ."

The plaintiff was a competent and conscientious officer and the Registrar General did not exercise his power of removal when the plaintiff, under instructions from his union and no doubt in agreement with the view that superintendent registrars were underpaid, took industrial action by declining to conduct weddings on Saturday.

> "(*g*) applying with any necessary modifications, adaptations and exceptions the provisions of the Local Government Act 1929 relating to the transfer, superannuation and compensation of officers; . . ."

These officers were in the main employed by local authorities under contracts of employment.

> "(*h*) conferring on the [proper officer appointed by the council for the purposes of the Act] powers with respect to—(i) the fixing of the hours of attendance of officers; (ii) the distribution of business between officers; . . ."

Section 13(3) authorised the local scheme to:

"(*b*) confer on the [proper officer] such general powers of supervising the administration within the [county or district] of the provisions of the Registration Acts as may be specified in the scheme."

Section 14 directed that the local scheme be prepared by each council and approved by the Minister of Health, now the Secretary of State for Social Services.

The Wakefield registration scheme, duly made by the council and approved by the Minister, assimilated a superintendent registrar with an appropriate local government officer in relation to salary scales, overtime pay, sick leave, travel expenses, superannuation and other matters. Under the Wakefield scheme, the plaintiff became entitled to a fixed salary and became bound to work a 37-hour week. Thus the position of the plaintiff was in many respects similar to the position of an employee. He was appointed by the council and paid a salary by the council out of public money, for a fixed number of hours of work, and he worked on council premises for the benefit of the public. The main differences between the position of the plaintiff and the position of an employee of the council were that the plaintiff could only be dismissed by the Registrar General and that the plaintiff performed tasks which were imposed by the central government in the interests of the nation generally.

Mr. Sedley, who appeared for the plaintiff, submitted and the majority of the Court of Appeal accepted that significance was to be attached to the fact that the plaintiff was not a servant under a contract of employment but the holder of an office. In the olden days satirised by Dickens and Thackeray a gentleman appointed to an office, for example, in the Chancery Registry or in the Department of Circumlocution and Sealing Wax, carried out his ill-defined duties at his leisure and pleasure. Trollope explained that a special Act of Parliament was necessary in order to control the functions and the stipend of the holder of the office of Warden of Hiram's Hospital. It is unusual for the holder of an office to take industrial action and the consequences will depend on the rights and obligations conferred and imposed on the office-holder by the terms of his appointment. But if an ambassador and the embassy porter were both on strike then I would expect both to be liable to lose or both to be entitled to claim their apportioned remuneration attributable to the period of the strike. A judge and an usher on strike should arguably be treated in the same manner. The ambassador might be required to decode a declaration of war on Sunday, and a judge might devote his Christmas holidays to the elucidation of legal problems arising from industrial action, so that it would be necessary to divide their annual salaries by 365 to define a daily rate applicable to the period of strike, whereas the weekly, daily or hourly wages of the porter and the usher provide a different basis for apportionment, but in principle it is difficult to see why there should be any difference in treatment. To decide this appeal it suffices that there is no logical distinction between a superintendent registrar who is paid a weekly salary for a 37-hour week and a municipal dustman who is paid a weekly wage for a 37-hour week if both are on strike, both are supported by their unions and both claim

from the council payment in full of their salary and wages for the duration of the strike. Middle class morality must not be allowed to place Mr. Dolittle in an inferior position in this respect.

Mr. Sedley contended that the power to dismiss a superintendent registrar conferred on the Registrar General was a penalty and the only penalty which could be inflicted on a superintendent registrar if he committed a breach of his duties. In my opinion this power was only intended to deal with transgressions which in the opinion of the Registrar General rendered a superintendent registrar unfit to continue in office. It does not follow that all other breaches of duty can be committed with impunity.

The Act of 1953 and the local scheme do not expressly authorise a deduction from the salary of a superintendent registrar if he declines to carry out his duties. It does not follow that the legislature intended to confer on a superintendent registrar the right to be paid if he declines to work. The Act of 1953 does not state the obvious, namely, that a superintendent registrar may be removed from office if he is guilty of serious default in the performance of his duties. The Act states that which would otherwise not be obvious, namely, that the power of removal shall be exercisable by the Registrar General and not by the council. It does not follow that the legislature intended to impose on the council the obligation to pay a superintendent registrar for doing nothing. If the plaintiff worked more than 37 hours in a week he was entitled to overtime pay in accordance with the provisions regarding overtime contained or incorporated in the local scheme. The council say that if the plaintiff in breach of duty worked less than 37 hours he is only entitled to be paid for his hours of work.

Mr. Sedley said that by the Act of 1953 the council were bound to pay the salary of the plaintiff; the council were not concerned to see whether the plaintiff gave value for money and were not entitled to benefit from the plaintiff's breach of duty by retaining any part of his salary. These submissions ignore the fact that the council is a public authority paying out public money for the purpose of securing a public service from a public official. The result of the local scheme and the appointment of the plaintiff was that the council promised to pay the plaintiff his weekly salary determined from time to time under the scheme and the plaintiff promised to devote 37 hours each week to the due performance of his duties.

Next, Mr. Sedley submitted that the plaintiff was entitled to be paid for 37 hours if he carried out his duties as a superintendent registrar (other than his marriage service duties) for three hours on Saturday and carried out all his duties as a superintendent registrar for 34 hours between Monday and Friday. Alternatively, the plaintiff was entitled to be paid for 37 hours if he carried out his duties for 37 hours between Monday and Friday. But the plaintiff refused to conduct marriage services on Saturday because he knew that it was his duty to conduct marriage services on Saturday and that his refusal would cause serious inconvenience to the public he was paid to serve. The plaintiff could not perform his Saturday duty of conducting marriage ceremonies by carrying out other tasks of a superintendent registrar on that day. Nor could the

plaintiff perform his Saturday duty of conducting marriage ceremonies on that day by conducting marriage ceremonies on other days and by working for 37 hours between Monday and Friday. Between Monday and Friday the plaintiff was only entitled to work 34 hours. On Saturday the plaintiff was entitled to work for three hours but only if he was willing to conduct marriage ceremonies.

Parker L.J. was impressed by the fact that under the Act of 1953 an additional registrar is paid by fees and certain superintendent registrars may elect to be paid by fees. Parker L.J. appears to have assumed that the council were bound to acquiesce in industrial action by a registrar paid by fees and were therefore bound to acquiesce in industrial action by a registrar paid by salary. But if a registrar paid by fees declines to work on Saturday, he receives no remuneration for that day. The plaintiff declined to work efficiently on Saturday but claims his full remuneration attributable to that day. A registrar cannot be compelled to work but the present dispute concerns the question as to whether a registrar on strike is entitled to be paid without working. By their letter dated 8 October 1981, the council made it clear that a registrar would not be paid for work on Saturday unless he was prepared to undertake the full range of his duties. Eveleigh L.J. rightly summed up the position of the plaintiff as follows [1985] 1 W.L.R. 822, 838, 839:

> "the local scheme indicates that a superintendent registrar's salary is like most other salaries payable for work which he is required to do according to the terms of his appointment. . . . the local scheme is to the effect that the salary is payable in respect of services rendered and I see nothing in this case to show that the council is required to pay when services were not rendered."

If the plaintiff is in no better position for present purposes than a worker under a contract of employment, he is in no worse position. Mr. Sedley submitted that unless and until an employer puts an end to a contract of employment by dismissing the worker, the employer must pay the worker his full contractual wages even though the worker is on strike. The plaintiff was not dismissed and was therefore entitled to his full salary.

My Lords, industrial action involves a worker, in conjunction with all or some of his fellow workers, declining to work or declining to work efficiently in each case with the object of harming the employer so that the employer will feel obliged to increase wages or improve conditions of work or meet the other requirements put forward by the workers' representatives. The form of industrial action which consists of declining to work is a strike. The form of industrial action which consists of declining to work efficiently has many manifestations including the "go slow" and the refusal by the plaintiff to carry out some of his functions on Saturday. In essence, the plaintiff was employed by the public and his industrial action took the form of declining to work efficiently on Saturday with the object of inconveniencing the public and advancing the claim of his union for higher salaries. Industrial action is an effective method of enhancing the bargaining power of the workers' representatives. The courts are not competent to determine and are not concerned to

determine whether a strike or other form of industrial action is justified or malicious, wise or foolish, provoked or exploited, beneficial or damaging; history has proved that any such determination is speculative and liable to be unsound. Any form of industrial action by a worker is a breach of contract which entitled the employer at common law to dismiss the worker because no employer is contractually bound to retain a worker who is intentionally causing harm to the employer's business.

The Employment Protection (Consolidation) Act 1978 provides that a worker who is lawfully dismissed shall nevertheless be entitled to prove to an industrial tribunal that he has been unfairly dismissed and is entitled to reinstatement or compensation. An individual worker is unfairly dismissed if the only reason for his dismissal is that he has taken part in industrial action unless all workers who take part are also dismissed. In practice, the Act protects a worker against losing his job as a direct consequence of his industrial action unless the employer goes out of business or is able to engage a wholly new and different work force. The legislation does not protect the worker against losing his wages during a period of industrial action. If the worker were protected against losing both his job and his wages, nearly every threat of industrial action would result in the capitulation of the employer. As a result of the Act, there is little point in an employer dismissing a worker who is engaged in industrial action which is expected to end in a negotiated settlement. If Mr. Sedley is right, however, the worker engaged in industrial action is entitled to his wages unless and until the employer serves a formal notice of dismissal which in the vast majority of cases will never affect the worker. Mr. Sedley concedes that a worker is not entitled to his wages if the employer serves formal notice of dismissal. Mr. Sedley, in effect, denies the right of the employer to say, expressly or by implication, to the worker engaged in industrial action: "I have no present intention of dismissing you but I will only pay you wages if you work." A worker who is on strike (as opposed to a worker who is locked out) does not usually line up for his pay packet on pay day during a strike. The worker thus recognises and accepts that whether or not he is dismissed for industrial action, he is not entitled to be paid if he declines to work. The worker hopes that the damage inflicted on or feared by the employer by industrial action will drive the employer to the bargaining table before the loss of wages suffered by the worker drives him back to work. In the present case the council refrained from calling upon the Registrar General to dismiss the plaintiff but by their letter dated 10 October 1981 announced that they would only pay for normal work. According to Mr. Sedley, the law of contract is so formalistic and inflexible that an employer may not keep a worker in his employ and refuse to pay him while he is engaged in industrial action. The employer must either dismiss the worker or pay him in full. Mr. Sedley submitted that where a worker under a contract of employment commits a breach of contract by declining to work, the remedies of the employer are rescission and damages. The employer may treat the conduct of the worker as repudiation of the contract and may accept the repudiation; in plain language, the employer may dismiss the worker. The employer will then cease to be liable to pay wages and

may sue the worker for any additional damages caused by the breach of contract. Alternatively, the employer may treat the contract as still subsisting; in that case the employer will be bound to pay the worker his full wages but may then sue the worker for unliquidated damages caused by the breach of contract. The same choice between dismissal and payment confronts an employer where the worker takes industrial action in the form of declining to work efficiently. The plaintiff has not been dismissed; the council must pay his full salary, and the council can then sue the plaintiff for damages. But then, according to Mr. Sedley, the council have suffered no damages and will not be able to recover any damages from the plaintiff; the only effect of the refusal of the plaintiff to conduct wedding ceremonies on Saturday was that members of the public who wished to be married on that day at the Wakefield District Registry were disappointed. If Mr. Sedley is right, the difficulty about damages applies to most forms of industrial action, so that in effect an employer must either dismiss a worker or pay his full wages albeit that the worker is either idle or is working in a manner calculated to harm the employer. A strike may involve the employer in a loss of profits but it is impossible to show that any particular proportion of the loss is attributable to the industrial action of any individual worker. If a chauffeur goes on strike for one day, his employer may only suffer the inconvenience or enjoyment of driving his own car for once. My Lords, an employer always suffers damage from the industrial action of an individual worker. The employer suffers the loss of the services of the worker. The value of those services to the employer cannot be less than the salary payable for those services, otherwise most employers would become insolvent.

In the present case, if the council were obliged to pay for the services of the plaintiff on Saturday morning, the council would suffer the loss of the money thus paid for services to the public which the plaintiff declined to perform. A man who pays something for nothing truly incurs a loss. The value of the lost services cannot be less than the value attributable to the lost hours of work. Indeed, the plaintiff embarked on industrial action because his union believed that the value of his services exceeded his current salary.

Mr. Sedley's next contention is that unless a worker is dismissed he is nevertheless entitled to his full wages on the due date in each week, although the employer can recover damages in proceedings which will eventually result in a judgment. But if the damages suffered by the employer are the wages for the lost hours, it would be purposeless to require the employer to pay the wages and then to recover a like amount by way of damages. If 10,000 workers earn £100 a week and go on strike for a week, no logical system of law will compel the employer to pay out £1m. at the end of the week, and then to issue 10,000 writs against 10,000 defendants to recover £100 from each.

For the past two years teachers have been engaged in sporadic strike action, usually on one day in a week. If Mr. Sedley is right, educational authorities must pay for strike days unless after each day's strike they issue dismissal notices. To show that the educational authorities have no intention of ruining the educational system by insisting on dismissal, the

dismissal notice must presumably be accompanied by a reinstatement notice. This would finally submerge the teaching profession in paper.

The consequences of Mr. Sedley's submissions demonstrate that his analysis of a contract of employment is deficient. It cannot be right that an employer should be compelled to pay something for nothing whether he dismisses or retains a worker. In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work. Different considerations apply to a failure to work by sickness or other circumstances which may be governed by express or implied terms or by custom. In the present case the plaintiff disentitled himself for his salary for Saturday morning because he declined to work on Saturday morning in accordance with his duty.

Where industrial action takes the form of working inefficiently, the employer may decline to accept any work and the worker will not then be entitled to wages.

I agree with my noble and learned friend Lord Bridge of Harwich that industrial action can take many forms and that the legal consequences of industrial action will depend on the rights and obligations of the worker, the effect of the industrial action on the employer and the response of the employer. For my part, however, I take the provisional view that on principle a worker who, in conjunction with his fellow workers, declines to work efficiently with the object of harming his employer is no more entitled to his wages under the contract than if he declines to work at all. The worker whose industrial action takes the form of "going slow" inflicts intended damage which may be incalculable and non-apportionable but the employer, in order to avoid greater damage, is obliged to accept the reduced work the worker is willing to perform. In those circumstances, the worker cannot claim that he is entitled to his wages under the contract because he is deliberately working in a manner designed to harm the employer. But the worker will be entitled to be paid on a quantum meruit basis for the amount and value of the reduced work performed and accepted. In the present case, the council by their letter dated 18 October 1981 refused to accept any work from the plaintiff unless he worked normally and discharged all his duties. The plaintiff offered to work inefficiently on Saturday but could not compel the council to accept that offer, and upon their refusal to accept that offer he ceased to be entitled to be paid for Saturday. My present view is that a worker who embarks on any form of industrial action designed to harm his employer gives up his right to wages under his contract of employment, in the hope that the industrial action will be successful in procuring higher wages in the future, and possibly in the hope that negotiations which end the industrial dispute will provide for some payment for the period of the industrial action.

Industrial action is largely a 20th century development introduced with success by the Bermondsey matchworkers at about the turn of the century. Industrial action is unique in that in order to be effective the

action must involve a repudiatory breach of contract designed to harm the employer. Most of the 50-odd authorities cited in the course of this appeal were ancient and irrelevant. There are, however, some authorities which concern or have some relevance to claims and defences arising out of industrial action.

The authorities disclose that a breach of some contracts affords the injured party the remedy of abatement, and that in many other circumstances a right to damages may be set off against a duty to pay.

The remedy of abatement applies to a contract for goods where the vendor agrees to supply 15 bottles of wine for £30 and only supplies 12 bottles. In that case the purchaser is entitled to pay £24 for the bottles received. That principle is apt to apply equally to a contract of employment where the worker agrees to work for 15 hours for £30 and only works for 12 hours so that the employer is entitled to pay £24 for the hours worked.

In *Mondel v. Steel* (1841) 8 M. & W. 858, 871–872, Parke B. said:

> "in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract . . . it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract . . ."

In *Hanley v. Pease & Partners Ltd.* [1915] 1 K.B. 698, where a worker absented himself without leave for one day, the employer suspended him from work the following day, and, as the worker was ready and willing to work on the following day, he was held entitled to be paid for the following day. It does not appear that the worker was paid for the day's absence when he was not ready and willing to work or that he claimed for that day's pay.

In *National Coal Board v. Galley* [1958] 1 W.L.R. 16, workers in an industrial dispute refused to work on Saturday. The board suffered a loss of profit due to the impossibility of working the Saturday shift. The board were not entitled, as against each worker, to recover a proportion of the loss of profit. Pearce L.J. delivering the judgment of the court said, at p. 29: "we do not think it can be said that any damage has been proved against him beyond the cost of a substitute, say £3 18s. 2d." The cost of a substitute will not be less than the value placed by the contract on the services of the worker.

In *Hanak v. Green* [1958] 2 Q.B. 9, 18, Morris L.J. in a judgment approved by Lord Diplock in *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.* [1974] A.C. 689, 717, referred to the right of equitable set-off by a defendant who possessed a liquidated or unliquidated claim arising out of the same contract, citing, as an example, at p. 20, *Morgan & Son Ltd. v. S. Martin Johnson & Co. Ltd.*

[1949] 1 K.B. 107. In that case the plaintiffs claimed a sum payable for storing the defendants' vehicles, and the defendants were held to be entitled to plead an equitable set-off in respect of damages for one of the vehicles which had been stolen as a result of the negligence of the plaintiffs.

In *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.* [1974] A.C. 689 Lord Diplock said, at p. 717, that the remedy of abatement:

> "is a remedy which the common law provides for breaches of warranty in contracts for sale of goods and for work and labour. It is restricted to contracts of these types. . . It is independent of the doctrine of 'equitable set-off' developed by the Court of Chancery to afford such relief in appropriate cases to parties to other types of contracts . . ."

In *McClenaghan v. Bank of New Zealand* [1978] 2 N.Z.L.R. 529, Chilwell J. held that bank employers were in breach of the New Zealand Wages Protection Act 1964 which provided by section 4(1): "the entire amount of wages payable to any worker shall be paid to the worker in money when they become payable." The bank employees went on strike for two days. The bank employers deducted two subsequent days' pay and were held to be in breach of the Act of 1964. Chilwell J. said, at p. 536, that the employer banks had a claim for damages for breach and if the Act had not stood in the way they would have had a set-off for those damages but that the banks had not sought damages nor an amendment to the pleadings, nor had they established any damage. The judge remarked that to work 12 days out of 14 was substantial performance if the contract were regarded as entire. But delivery of 12 bottles out of 14, though in some respects substantial performance, does not oblige the purchaser to pay for the two missing bottles.

In an unreported decision of Lord Cowie in the Outer House of the Court of Session, *Laurie v. British Steel Corporation*, 23 February 1978, workers took industrial action by declining to work normally. They were suspended, their wages were not paid during the period of suspension, and Lord Cowie held that they were not entitled to recover the amounts deducted. It was argued that the only remedies of British Steel were to rescind the contract, with or without a claim for damages, or simply to claim damages which they had not proved. Lord Cowie held that a contract of employment gave rise to mutual obligations, and that if one party failed to fulfil his obligations, he could not call on the other party to fulfil his.

In *Henthorn v. Central Electricity Generating Board* [1980] I.R.L.R. 361, workmen employed by the C.E.G.B. took part in an unofficial "work to rule." The C.E.G.B. were of the opinion that the workmen were not performing their contracts of employment and refused to pay the men for the days on which they were working to rule. Lawton L.J., with whose judgment Bridge and Shaw L.JJ. agreed, held that in order to recover, the workmen must allege and prove that they were ready and willing to perform their part under the contract of employment.

In *Welbourn v. Australian Postal Commission* [1984] V.R. 257, postal workers refused to perform certain work which had been banned by their union. The postal authorities did not order the workers to cease performance of the balance of their work and did not dismiss them, but indicated that the workers would not be permitted to leave the post office and that leaving the post office or not attending in future would be regarded as a serious dereliction of duty. Fullagar J. held that in those circumstances the post office were not entitled to withhold pay for the period during which each worker refused to carry out banned work. Of course, where an employer insists that a worker engaged in industrial action shall nevertheless attend, and the worker does attend, it is impossible for the employer to maintain that the worker is not entitled to be paid for his attendance. In the present case, however, the council made it clear that if the plaintiff was not prepared to conduct wedding ceremonies on Saturday, he was neither required nor entitled to attend at the registry office.

In *Sim v. Rotherham Metropolitan Borough Council* [1987] Ch. 216, where a teacher in breach of contract refused to work during his "free hours," Scott J. held that the principle of equitable set-off applied to contracts of employment and that the local authority employers were entitled to make deduction from the teacher's salary by way of equitable set-off of amounts calculated to represent the financial loss suffered by those authorities. In that case the amounts of the deductions were accepted by the teacher as reasonable. In the present case, since the deduction made by the council is less than the value placed upon the services of the plaintiff by his union in their industrial dispute for higher salaries, the deduction can hardly be unreasonable.

Two of the authorities (*Laurie v. British Steel Corporation* and *Henthorn v. Central Electricity Generating Board*) held that a contract of employment does not entitle a worker to wages but entitles him to claim wages for work which he carries out or is willing to carry out pursuant to the contract. Some authorities (*National Coal Board v. Galley* and *Sim v. Rotherham Metropolitan Borough Council*, and other cases) proceed on the footing that a contract of employment entitles a worker to wages and that a refusal to work only founds a claim for damages by the employer. Whether a refusal to work prevents a claim by the worker or affords a defence to the employer, workers taking industrial action have not recovered their wages save in two cases. The first case, *McClenaghan v. Bank of New Zealand* [1978] 2 N.Z.L.R. 528, was decided on the construction of a New Zealand statute with which your Lordships are not concerned, and the obiter remarks of the judge concerning the position at common law do not commend themselves to me. In the second case, *Welbourn v. Australian Postal Commission* [1984] V.R. 257, the employers were obliged to pay wages because they insisted that the workers attend for work and the workers complied. In my opinion, wages are remuneration which must be earned; in a claim for wages under a contract of employment, the worker must assert that he worked or was willing to work. The principle is elegantly expressed in the speech prepared by my noble and learned friend, Lord Oliver of Aylmerton, and is supported by the additional authorities to which he

refers. When a worker in breach of contract declines to work in accordance with the contract, but claims payment for his wages, it is unnecessary to consider the law relating to damages and unnecessary for the employer to rely on the defences of abatement or equitable set-off. The employer may or may not sustain and be able to prove and recover damages by reason of the breach of contract for each worker. But so far as wages are concerned, the worker can only claim them if he is willing to work. The plaintiff is in no better position than a worker under a contract of employment in declining to work in accordance with the duties of his office.

I would allow the appeal and dismiss the action.

Lord Oliver of Aylmerton. My Lords, the factual background from which this appeal arises has already been set out in the speech delivered by my noble and learned friend, Lord Templeman, which I have had the advantage of reading in draft. The appeal raises, essentially, three questions. First, on the true construction of the relevant legislation and of the local scheme made thereunder, is the salary of a superintendent registrar of births, deaths and marriages an honorarium attached to mere tenure of the office, regardless of whether the officer-holder chooses to perform all or any of the duties attached to it (as the majority in the Court of Appeal held), or is it in the nature of remuneration for work done (as was the view of Eveleigh L.J. in his dissenting judgment in the Court of Appeal and of Nicholls J. in the court of first instance)? Secondly, if the true nature of the plaintiff's salary is remuneration for work done and thus to be equiparated to the salary or wages of an employee under a contract of employment, would the appellant council, in the circumstances of this case, have been entitled to withhold all or part of the salary in respect of a period in which the plaintiff declined to carry out the duties of his office if he had in fact been employed by the council to carry out those duties? Thirdly, it having been conceded in the council's written case that the evidence before Nicholls J. could not support a contention that the plaintiff was in fact employed by the council under a contract of employment, is it permissible, as Eveleigh L.J. and Nicholls J. concluded, to apply to the statutory relationship between them arising from the holding by the plaintiff of his office as superintendent registrar the analogy of a contractual employment and, if so, what is the consequence of so doing?

As to the first of these questions, there appear to me to be a number of indications pointing to the conclusion that the salary was intended to be the reward for the work done in carrying out the duties of the office and not simply an honorarium for its mere tenure. Prior to the Local Government Act 1929, a registration officer's remuneration was derived from the fees which were payable to him for carrying out his functions. If he failed to perform a particular function on a particular occasion he was not paid for it. By section 22(1) of the Act of 1929 it was provided that upon any vacancy occurring after the appointed day in the office of a registration officer, the office should become a salaried office and, by subsection (2) of the same section, existing registration officers were given the option of becoming salaried officers. The "salary or

remuneration to be attached to any salaried office" was to be determined by the responsible council: section 22(4)(*a*). After the Registration Service Act 1953 all registration officers became salaried. It is difficult to see any reason why the legislature should have intended to substitute for a system of remuneration which originally depended entirely upon the volume of work done an honorarium entirely unrelated to the work done and payable for the mere holding of the office regardless of whether or not the holder carried out the duties of the office. There is no provision of the Act of 1929 or of the Act of 1953 which compulsively leads to this conclusion as a matter of construction. On the contrary, the more natural construction of the "salary and other remuneration" which is to be fixed by the local authority under section 13(2)(*e*) of the Act of 1953 is that these words connote a financial reward for services rendered. Again, section 13(2)(*f*) imposes on the local authority the duty to fix the conditions upon which the office of a superintendent registrar is held—a duty which, whilst it may not establish a contractual nexus between the authority and the appointee, certainly assimilates his position to that of an employee, an assimilation which is strengthened by the power of supervision conferred on the proper officer of the local authority by section 13(2)(*h*). Moreover, as was pointed out by Eveleigh L.J. in his dissenting judgment in the Court of Appeal [1985] 1 W.L.R. 822, 837, the salary fixed by the local authority under paragraph 5 of the local scheme is directly related to the number of hours required for the proper performance of the duties of the office. For my part, therefore, I am persuaded that the true nature of the salary for which statutory provision is made by section 13 of the Act is that it is a remuneration for work done and not simply an honorarium for the tenure of office.

My Lords, it does not of course follow from this that a failure on the part of the office-holder to perform the duties of his office necessarily entitles the local authority to withhold payment of the whole or part of his remuneration, but if that is to be justified at all the determination of the nature of the salary is a first and essential step. If the authority would have no right at common law to withhold any part of the salary were it payable pursuant to a contract of employment, there is certainly nothing in the Act of 1953 which would give the local authority any higher right than that possessed by an employer. Mr. Sedley, on behalf of the plaintiff, has drawn attention to a number of authorities in support of the proposition that an employer under a contract of employment has no such right. He submits that, in a case where an employee is in breach of the terms of his employment, the employer has only two options. He may, if the failure to carry out contractual duties is sufficiently serious, treat it as a repudiatory breach of contract and accept the repudiation, thus bringing the contract to an end and excusing himself from further performance of his own obligation to pay the contractual wage or salary. Alternatively, he may affirm the contract and sue for damages for the breach which has occurred. That claim is one which, if he is sued by the employee for wages, he can exert by means of a counterclaim or setoff, so that effectively he can, in practice, make a deduction from the employee's wages. If he does, however, he must be prepared to justify the deduction by reference to the damage which

A he has suffered. That the options in case of breach of contract are thus restricted is, Mr. Sedley submits, clearly established by decisions of this House in, for instance, *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, and *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827. The same principle equally applies, Mr. Sedley submits, to contracts of employment. Thus in *Sim v. Rotherham Metropolitan Borough Council* B [1987] Ch. 216, where a teacher had declined to perform part of his duties but the employing authority had affirmed the contract and continued to accept his services, a deduction from the employee's wages was justified only by reference to a set off of the employer's claim for damages for breach of contract. In the instant case what is said is that, even if the entitlement of the plaintiff to salary under the statute is C analogous to the contractual right of an employee, the council cannot justify the withholding of salary by reference to either option. The council cannot accept the refusal of the plaintiff to carry out his statutory duties as a repudiation disentitling him to claim the salary because, ex hypothesi, there is no contract with the council which can be repudiated. Further and in any event, the plaintiff continued to perform the other duties of his office and certainly no claim has been made by the council D that he is not entitled to any salary at all. Equally, the alternative option is closed to the council because it is unable either to show any damage which it has suffered—such damage as there was as a result of the inconvenience caused having been damage to the general public and not to the council—or to demonstrate any juristic basis for a counterclaim for damages by the council arising otherwise than from a breach of E contract.

My Lords, I see much force in these arguments and were it not for the principles to which I am about to refer I would, for my part, feel bound to reach the same conclusion as that reached by the majority of the Court of Appeal. But the critical point in this case and the point which, in my judgment, answers Mr. Sedley's contentions is that the action which was tried by Nicholls J. and which gave rise to this appeal F was an action in which the plaintiff claimed certain sums as due to him by way of salary and in which, therefore, he assumed the burden of pleading and proving each essential allegation necessary to establish his entitlement. Although, speaking for myself, I question whether the mere fact that the plaintiff was appointed to his office under the provisions of the Act of 1953 necessarily precludes the existence of a parallel contract G between him and the council for the carrying out of his statutory duties, it has been accepted for the purposes of the present appeal that no contractual nexus exists between him and the council. Nevertheless, the nature of his remuneration and the terms of his tenure of office are so closely analogous to those of a contract of employment that any claim by him to salary payable pursuant to the statutory provisions and the local scheme made thereunder ought, in my judgment, to be approached H in the same way as a claim to salary or wages under such a contract. The relationship between the council and the plaintiff has all the incidents which one would expect from a contract of employment save that the power of dismissal is vested in the Registrar General and not in

the appointing authority which has the responsibility for paying the plaintiff, providing him with premises, and regulating his hours and conditions of work. If, as a matter of law, he were employed by the council I do not, for my part, see any difficulty in finding a juristic basis for the retention of salary which the council has made. The simple fact would be that the council had suffered damage to the extent that it was liable to pay for what was, in effect, a period of voluntary absence from work and I see no particular difficulty in quantifying that damage, since the employee could hardly contend successfully that that of which his employer had been deprived by his absence (i.e. his services) was worth less than the sum which he was claiming to be paid for them. And, in my judgment, on the facts of the case, the proper inference to be drawn is that the plaintiff was refusing to work on Saturdays and was thus, in effect, voluntarily absent on that day. It is true that he attended the office on Saturday but it was, at the outset, made clear to him by the council, whose proper officer had under the statute the task of supervising the administration of the Registration Acts and fixing the hours of attendance, that if he was not prepared to carry out his proper function of conducting weddings his attendance at the office on Saturdays was not required and would not be recognised as a performance of his duties. Thus, applying the contractual analogy, the plaintiff's position was no different from that of an employee voluntarily absenting himself from work. The question to be asked, therefore, is not so much "has the employer a *right* to withhold from an employee who voluntarily absents himself from work wages for the period in which he is absent?" but "is the employee entitled to sue for and recover from his employer wages in respect of a period during which he has made it perfectly clear that he is not ready and willing to perform his own contractual obligations?" To put it another way, is it sufficient for the employee simply to plead a contract for his employment over a given period or must he, in order to substantiate his claim, aver and prove something more than the mere formation of the contract? Mr. Sedley has submitted that to deny to the plaintiff his claim for salary in respect of the period not worked would be to contradict a long line of authority establishing the employee's right to wages for periods of involuntary absence due to sickness. Speaking for myself, I have found this a useful analogy, for there is, I think, to be found in those cases the answer to the question posed above. The line of cases referred to was reviewed by Scott L.J. in *Marrison v. Bell* [1939] 2 K.B. 187, and they all stem from and follow the decision in *Cuckson v. Stones* (1858) 1 E. & E. 248, where the distinction is clearly drawn between voluntary and involuntary non-performance by a servant of the duties of his employment. The plaintiff in that case had pleaded a contract of employment at a wage of £2 10s. per week and that, at pp. 249–250:

> " 'although all things have happened and been performed in order to entitle the plaintiff to the performance of the said promise of the defendant, yet the defendant . . . refused to pay the said plaintiff the said sum of £2 10s. 0d per week for divers, to wit 13, weeks.' "

To that the defendant pleaded in his fourth plea, at p. 250:

A " 'to so much of the first count as relates to the claim therein for wages: that the plaintiff was not, during any part of the time for and in respect of which such wages are by that count claimed, ready and willing or able to render, and did not in fact during any part of such time render, the agreed or any service.' "

The plaintiff demurred to the fourth plea and issue was joined. Cockburn B C.J. at the trial directed a verdict for the plaintiff with leave to move to enter a verdict for the defendant, or for a non-suit. The defendant then obtained a rule to show cause why the verdict should not be set aside and the verdict entered for the defendant, at p. 251:

" 'on the ground that, upon the evidence, the plaintiff is not entitled to a verdict upon the fourth plea; and that the plaintiff is not C entitled to recover the weekly wages for the time during which he has not performed the service.' "

The demurrer was directed to come on for argument with the rule. The judgment of the court as to the demurrer to the fourth plea was delivered by Lord Campbell C.J. It is instructive and, so far as material, was as follows, at pp. 255–256:

D "We are of opinion that this plea is good. It is pleaded only to the claim for wages; and it avers 'that the plaintiff was not, during any part of the time for and in respect of which such wages are by that count claimed, ready and willing or able to render, and did not in fact during any part of such time render, the agreed or any service.' We think the gist of the plea is that the plaintiff, during the time in E question, was not ready and willing to render, and did not render, any service, in the sense that he voluntarily and wilfully refused or omitted to serve. If so, we think he could not claim the wages to be paid to him in consideration of his service. It was objected that his breach of the contract would only be the subject of a cross-action. But the alleged breach of the contract on his part seems to go to the whole consideration for the wages: we must treat the demurrer F as if the action were brought for the wages only: and, to avoid circuity of action, it may well be considered that this action should be barred, so as to prevent an unjust advantage in this action, and to put an end to further litigation, rather than that the plaintiff should be allowed to recover wages when he had refused to serve, and that another action should afterwards be brought against him to G recover back the amount.

On the rule as to entering the verdict on the fourth plea, at p. 256:

"Whether, when issue is joined on such a plea, the want of ability to do the act proves, in point of law, a want of readiness and willingness, depends upon whether the want of ability is necessarily a breach of the contract to perform a condition precedent, or the H consideration for the promise sued upon. In an action for not accepting goods purchased, issue being joined on a plea that the plaintiff was not ready and willing to deliver them, the defendant would be entitled to a verdict, on proof that the plaintiff never was

in possession of the goods he undertook to deliver. But, looking to the nature of the contract sued upon in this action, we think that want of ability to serve for a week would not, of necessity, be an answer to a claim for a week's wages, if in truth the plaintiff was ready and willing to serve had he been able to do so, and was only prevented from serving during the week by the visitation of God, the contract to serve never having been determined."

Thus the distinction between voluntary and involuntary inability is clearly brought out. It has been the council's contention before this House and was, as I read his judgment, also the contention before Nicholls J. that the council's obligation to pay salary and the plaintiff's willingness at least to perform his contractual duties were interdependent. That certainly derives support from the case cited. But the matter does not end there. I entirely accept that in the case of the ordinary contract of employment there is no entitlement in the employer to withhold wages for bad work (save in the case of special stipulation to that effect) or, without treating a breach of contract by the employee as a repudiation, to accept such services as the employee is prepared to render under his contract and deduct from his remuneration self-assessed damages for such work as he fails to perform or fails to perform properly. Whether in such a case the employer is entitled to any set-off in respect of damage which he may have suffered is a matter which must depend upon the facts of each individual case. But where the employee declines to work at all for a particular period—and I have already said that, in my judgment, this case has to be approached on the basis that the plaintiff was simply withholding his services on Saturdays—then, subject to the question of whether the wages or salary payable are apportionable on a periodic basis, I see no ground upon which the employee who declines to perform that condition upon which payment depends can successfully sue for the remuneration which is dependent upon its performance. An employee, for instance, who is rightly dismissed from his employment can recover salary which has become due and payable at the date of his dismissal but cannot recover sums becoming due and payable at some later date and on the condition that he has performed his contractual duties down to that date: see *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888) 39 Ch.D. 339, 364, *per* Bowen L.J.

My noble and learned friend Lord Templeman has referred in the course of his speech to the unreported Scottish case of *Laurie v. British Steel Corporation*, 23 February 1978. This is a good example of the practical interdependence of the employee's willingness to perform on the one hand and the employer's obligation to pay wages on the other. That too was a case where employees had absented themselves from work but had nevertheless taken upon themselves the burden of averring and proving their entitlement to wages for the period of absence. The interdependence of the obligations on both sides is aptly summarised in the following extract from the opinion of Lord Cowie in the Outer House of the Court of Session:

A "counsel [for the pursuers] pointed out that no rescission of the pursuers' contracts of employment had taken place, and so the defenders were not entitled to refuse to fulfil their obligations. For the defenders it was argued that they were not seeking a remedy against the pursuers for breach of contract. Their position was, that these being contracts of employment they gave rise to mutual obligations and if one party failed to fulfil his obligations, he could not call on the other party to fulfil his. That was all that had happened here. The defenders maintained that the pursuers had failed to fulfil their obligation to work during a specific period; this was a breach of their contracts of employment and so they could not call on the defenders to fulfil their obligations to pay their salaries during the relevant period."

After referring to *Turnbull v. M'Lean & Co.* (1874) 1 R. 730 and *Alexander Graham & Co. v. United Turkey Red Co. Ltd.*, 1922 S.C. 533, Lord Cowie continued:

"The feature of all these cases referred to in *Graham* was, of course, that the contracts had, in each case, terminated, whereas in the present case the contracts of employment continued and the defenders simply refused to fulfil their obligation to pay the pursuers' salaries during a specific period of the currency of the contracts. In spite of this apparent specialty, however, I do not see why the general principle should not still apply. That general principle embodies the fundamental rule that if one party does not fulfil his part of the mutual contract he cannot turn round and demand performance by the other of his part of the contract. . . . It seems to me that assuming that the pursuers were in material breach of their contracts in June 1976, there were certain remedies open to the defenders, and they could have exercised them if they so desired. It does not follow, however, that because the defenders did not exercise their remedies, the pursuers have the right to demand performance of the defenders' part of the contract when they have not carried out their own part. In principle it does not seem to me to matter that the defenders have not taken the formal step of rescinding the contract. If the pursuers have not carried out their obligations, they cannot sue for performance by the defenders of their obligations. No reference is made in any of the cases to the necessity of rescinding the contract, before putting forward the defence that the other party cannot sue for performance because he has not fulfilled his own obligations. In my opinion it is not necessary to do so, and in these circumstances, if the defenders can establish a material breach of contract by the pursuers in June 1976, the latter would have no right of action to enforce payment by the defenders of their salaries or indeed to obtain the declarator sought."

The "general principle" referred to was stated thus in *Turnbull v. M'Lean & Co.*, 1 R. 730, 738:

> "With us . . . all the conditions of a mutual contract are dependent on their counterparts, as a general rule, when they are of the substance of or material to the subject matter of the contract itself."

The same approach appears from the opinion of Lord Salvesen in *Alexander Graham & Co. v. United Turkey Red Co. Ltd.*, 1922 S.C. 533, 546. There was, it appears, nothing particularly novel in this so far as the law of Scotland is concerned. The same principle appears as long ago as 1861 in *Johnston v. Robertson* (1861) 23 D. 646. Lord Justice-Clerk Inglis observed, at p. 656:

> "in a mutual contract, where one party seeks performance of the stipulations in his favour, he must show that he has given or tendered performance of his part of the contract. Every action on a mutual contract implies that the pursuer either has performed, or is willing to perform, his part of the contract; and it is, therefore, always open to the defender to say that under the contract a right arises also to him to demand performance of the contract before the pursuer can insist in his action."

The same principle has been applied in England. In *Henthorn v. Central Electricity Generating Board* [1980] I.R.L.R. 361, the plaintiffs were two employees at a power station. They engaged in the practice known as "working to rule." The facts are not entirely clear but the point which arose for decision was essentially one of pleading. In the case of the plaintiff Henthorn, his claim indicated that he had presented himself for work but that the employer had declined to accept his services. In the case of the plaintiff Taylor, the pleading was less clear and indicated that he had in fact been admitted for the purpose of working and that his services had been accepted. To both claims the employer pleaded simply that the plaintiffs were taking unofficial industrial action in breach of their contracts of employment and on that ground resisted the plaintiffs' claim for wages for the days upon which the industrial action had taken place. The claims having been referred to arbitration under section 92 of the County Courts Act 1959, the arbitrator treated the employer's pleading as a confession and avoidance and made an award in favour of the plaintiffs on the basis that the burden was on the employer to show that they had not been willing to work on the days for which the wages were claimed. The matter came before the Court of Appeal on an appeal from the refusal of the judge to set aside the award. The appeal was allowed and the award set aside. Lawton L.J., in delivering the leading judgment, said, at pp. 362–363, that the arbitrator

> "seems to have assumed that because the defendants were admitting that the plaintiffs were employed by them and were alleging that they had not done their job as they should have done it, they were assuming a burden of proof. In other words, he was approaching the problem on the basis that the particulars of defence constituted a confession and an avoidance. I am satisfied that the defendants' pleading was not such a plea. When a plaintiff claims that he is entitled to be paid money under a contract which he alleges the defendant has broken he must prove that he was ready and willing

A to perform the contract. That, in my judgment, is a rule of the common law as is shown by the precedents of pleadings in *Bullen & Leake, Precedents of Pleadings*, 3rd ed. (1868). . . . Mr. Henthorn, in his particulars of claim, was following what was in the third edition of *Bullen & Leake, Precedents of Pleadings*, because he was saying that he was ready and willing to work and presented himself for work. There have, of course, been many changes in the law B since the publication of the third edition of *Bullen & Leake, Precedents of Pleadings*, but the burden of proof in contract cases of this kind has not been shifted by any of the statutory changes in procedure which have been made in the last 100 years. . . . It follows, so it seems to me, that all the defendants were doing was to put in issue, by their particulars of defence, the question whether C the plaintiffs were ready and willing to perform their contracts of employment, and on the authorities to which I have referred, the burden of proof rested on the plaintiffs. It follows that when Judge Davies took the view, as he did, that it was for the defendants to establish their allegation that the plaintiffs were not ready and willing to perform their contracts, he misdirected himself on the very fundamentals of the case."

D

Another case in which wages were claimed for what was, effectively, a period of absence from work was *Cresswell v. Board of Inland Revenue* [1984] I.C.R. 508. In that case, employees of the Board of Inland Revenue refused their employers' lawful instructions to operate a computerised system. Their contracts of employment contained powers E of suspension, but the board made it clear that it was not relying upon this. Equally it did not accept the employees' refusal as a repudiation. It simply indicated that the employees would not be permitted to work so long as they refused its lawful instructions and that it would not pay for the manual services which the employees were willing to tender but which the board, acting within its rights under the contract, was not prepared to accept as a performance of the employees' obligation. F Walton J. dismissed the plaintiffs' claim and it is worth quoting from his judgment, where the principle is thus pithily expressed, at p. 522:

"On this part of the case, which, if the plaintiffs were correct, would mean that the revenue would have to go on paying them all during the time they were refusing to carry out the perfectly lawful requirements of their employer, [counsel for the revenue] rested his G case on the very simple ground that, so far as an employer and an employee are concerned, the promises of pay and work are mutually dependent. No work (or, at any rate, readiness to perform whatever work it is the employee ought to be willing to perform if physically able to do so)—no pay. This is such an obvious principle, founded on the simplest consideration of what the plaintiff would have to prove in any action for recovery of pay in respect of any period H where he was deliberately absent from work of his own accord, that direct authority is slight—slight, but sufficient: see, for example, *Denmark Productions Ltd. v. Boscobel Productions Ltd.* [1969] 1 Q.B. 699, *per* Winn L.J., at pp. 713F—732F; *Secretary of State for*

Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455, *per* Lord Denning M.R., at pp. 491F—492E; and in particular an unreported case from Scotland, *Laurie v. British Steel Corporation*, 23 February 1978—a decision of Lord Cowie."

Thus it is Mr. Irvine's submission on behalf of the council that there is no necessity to engage in a tortuous process of seeing whether the council can establish by way of set off some valid counterclaim for damages quantified so as to equal or exceed the amount of the plaintiff's claim. The plaintiff, he submits, fails at an earlier stage because he simply is not able to aver and prove that he was ready and willing to perform the services which formed the consideration for the payment claimed and on the performance of which it depended. His claim simply fails for want of proof of an essential allegation. The essential question is whether what Mr. Irvine has termed the theory of interdependent obligation is consistent with the authorities relied upon by Mr. Sedley in support of his proposition that, short of accepting the employee's breach as a repudiation determining the contract altogether, there is no way in which an employer can resist a claim for the full contractual remuneration other than the establishment of a counterclaim for damages.

My Lords, I confess that I have not found the question an easy one to answer but in the end I am persuaded by Mr. Irvine's submissions. A plaintiff in an action for remuneration under a contract of employment must, in my judgment, assume the initial burden of averring and proving his readiness and willingness to render the services required by the contract (subject, no doubt, to any implied term exonerating him from inability to perform due, for instance, to illness). I do not, for my part, find this inconsistent with the cases to which Mr. Sedley has drawn attention and which preclude the employer from accepting the services tendered whilst at the same time seeking to penalise the employee for some other breach of his contractual obligations. For instance, *Hanley v. Pease & Partners Ltd.* [1915] 1 K.B. 698 was a case in which the employer unsuccessfully sought to withhold from his employee, as a punishment for absence on a previous day on which he had not worked, wages for a day on which the employee had worked. It is interesting to note that there does not appear to have been any dispute that that employee was not entitled to be paid for the day on which he was absent. *Healey v. Société Anonyme Française Rubastic* [1917] 1 K.B. 946—a decision approved by this House in *Ramsden v. David Sharratt and Sons Ltd.* (1930) 35 Com.Cas. 314—was a case not of absence but of misconduct. The claim there was for salary in respect of a period properly worked by the employee prior to his dismissal which he was held entitled to recover. *Williams v. North's Navigation Collieries (1889) Ltd.* [1906] A.C. 136 was another case concerned with a claim to deduct from wages due for a period properly worked a sum due in respect of a previous period of absence. The decision, in any event, turned upon the provisions of the Truck Act 1831 (1 & 2 Wm. 4, c. 37). *Sim v. Rotherham Metropolitan Borough Council* [1987] Ch. 216 contains a lucid analysis by Scott J. but was not concerned with the point argued by Mr. Irvine. It was not itself an action for wages but was an action for

a declaration that the employer had no right to make any deduction from the employee's wages for the non-performance of certain of the employee's duties, the services of the employee having been continued and accepted by the employer. The deduction was there justified by the employer's cross-claim for damages for breach of contract, there being no dispute about quantum. Two cases particularly relied upon by Mr. Sedley were *McClenaghan v. Bank of New Zealand* [1978] 2 N.Z.L.R. 528 and *Welbourn v. Australian Postal Commission* [1984] V.R. 257. The former was concerned with the withholding by the employer of wages in respect of a period during which the employee had worked in accordance with his contract which was sought to be justified on the ground of a breach of contract in a previous period. There was no cross-claim by the employer for damages and, in any event, the decision turned on the provisions of the New Zealand Wages Protection Act 1964. In *Welbourn*, the employee had presented himself for duty but indicated his unwillingness to perform certain functions. The employer nevertheless accepted the services tendered, but at the same time sought to withhold the payment of wages. The employer in that case, having not only accepted the benefit of the services offered but insisted upon the employee staying at the place of work to perform them, was hardly in a position to refute that the employee was ready and willing to perform contractual services which the employer was prepared to accept. But in any event the decision ultimately turned on the specific provisions of the Australian Postal Services Act 1975. I do not for my part find that any of these cases touches the point which, as I read his judgment, ultimately formed the basis for Nicholls J.'s decision and which, in my judgment, concludes this appeal in the council's favour. It may well be that different considerations apply where an employer claims to withhold remuneration under a subsisting contract on the ground of past misconduct or where the employer has, by accepting and directing the employee's services, precluded himself from denying that the employee was ready and willing to perform (albeit possibly incompletely) the services which his contract obliged him to render. But for the reasons which I have endeavoured to expound I do not consider that the instant case is in pari materia and I prefer to reserve any comment about such a case until it arises.

As I have already indicated, the position of the plaintiff is very closely analogous to that of an employee employed by the council under a contract of service and embraces substantially all the incidents normally associated with such an employment save that the power of dismissal lies elsewhere than in the paymaster. In the context of a claim against the paymaster for remuneration for his services, where the question is "has the plaintiff earned the salary which he claims?", the analogy appears to me to be exact and in my judgment the burden which the plaintiff has to assume in order to succeed in a claim for his statutory remuneration is no different from that required of an employee. I would, for my part therefore, answer the third question postulated above in the affirmative. Applying the contractual analogy, the plaintiff cannot, for the reasons which I have given, successfully claim that he was at the material time ready and willing to perform the work which he was properly required

to do on Saturdays and his action for the remuneration attributable to that work must fail. I would also prefer to reserve my opinion with regard to the question whether there may not be circumstances in which an employee engaged in industrial action might be entitled to claim remuneration on a quantum meruit basis for work actually done.

Appeal allowed with costs.

Solicitors: Sharpe, Pritchard & Co. for Solicitor, Wakefield Metropolitan District Council; Penelope Grant.

M. G.

[PRIVY COUNCIL]

GRAHAM RALPH FRANKLAND . . . . . APPELLANT

AND

THE QUEEN . . . . . RESPONDENT

STEPHEN PHILIP MOORE . . . . . APPELLANT

AND

THE QUEEN . . . . . RESPONDENT

[APPEALS FROM THE STAFF OF GOVERNMENT DIVISION (CRIMINAL JURISDICTION) OF THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN]

1987 Feb. 2, 3; March 3

Lord Mackay of Clashfern, Lord Elwyn-Jones, Lord Ackner, Lord Oliver of Aylmerton and Lord Goff of Chieveley

Isle of Man—Crime—Homicide—Murder—Mental element—Juries directed in accordance with objective test of intent on charge of murder—Whether misdirection—Criminal Code Act 1872, s. 18[1]*—Criminal Code (Amendment) Act 1921, s. 12(1) (as amended by Criminal Appeal Act 1969 (c. 12), s. 8(c))*[2]*—Evidence Act 1983 (c. 7), s. 6*[3]

The defendant F. was charged with murder in the Isle of Man, contrary to section 18 of the Criminal Code Act 1872, and

[1] Criminal Code Act 1872, s. 18: see post, pp. 584H—585A.
[2] Criminal Code (Amendment) Act 1921, s.12(1), as amended: see post, p. 594G–H.
[3] Evidence Act 1983, s. 6: "A court or jury, in determining whether a person has committed an offence—(*a*) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (*b*) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

tried in the Court of General Gaol Delivery in 1980. The case for the Crown was that F. went to the house of the deceased, with whom he used to live, bound and gagged him and tied him to a bed and left him there not intending to return to release him for several days. The deceased, then aged 67, died about 48 hours later in that position. F.'s defence was that he did not intend to kill the deceased or cause him really serious injury, but had merely sought to immobilise him until F.'s girlfriend had left the island to prevent the deceased from making false statements about F. to her. F. denied knowing that the deceased was unwell. The judge, in directing the jury in relation to the mental element necessary to sustain a charge of murder in accordance with *Director of Public Prosecutions v. Smith* [1961] A.C. 290, directed them that if they found that the defendant intended to do something unlawful to the deceased they were not concerned with what the defendant contemplated as the probable result of his unlawful act but were to apply the objective test of what an ordinary reasonable man would in all the circumstances contemplate as the natural and probable result, and if that was death or really serious bodily harm the defendant would be guilty of murder. F. was convicted of murder.

The defendant M. was charged with murder, contrary to section 18 of the Criminal Code Act 1872, and he was tried in the Court of General Gaol Delivery in 1982. The Crown's case was that he shared a flat in the Isle of Man with a girl and her 16 month old child, and that while she was at work he inflicted a blow to the child's abdomen with such force that the liver was split and the child later died. M.'s defence was that he was not the person who had caused the injury which killed the child. A different judge gave the jury substantially the same direction as to intent as that given in F.'s case. M. was convicted of murder.

Both F. and M. appealed against their convictions to the Staff of Government Division (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man, who (differently constituted for each appeal) upheld the directions and dismissed the appeals. The objective test of intent was subsequently abolished in the Isle of Man by section 6 of the Evidence Act 1983, which came into operation on 17 May 1983.

On the defendants' consolidated appeals to the Judicial Committee:—

Held, allowing F.'s appeal and dismissing M.'s appeal, (1) that before section 6 of the Evidence Act 1983 came into operation in the Isle of Man the common law of England was applicable to determine what constituted in Manx law the necessary mental element in murder; that although English decisions, while not binding on the Manx courts, were of high persuasive authority and should be followed unless there was some provision to the contrary in the local law or conditions which would give good reason for not following an English decision, the decision of the House of Lords in *Director of Public Prosecutions v. Smith*, if it did lay down that the test of intent in murder at common law was an objective test, was erroneous; and that, accordingly, the trial judges had misdirected the juries in leading them to believe that the intentions of the defendants could be ascertained by an objective test (post, pp. 585A–B, 593D–E, 594E–G).

Dicta of Lord Diplock in *Reg. v. Hyam* [1975] A.C. 55, 94, H.L.(E.), Lord Bridge of Harwich in *Reg. v. Moloney* [1985] A.C. 905, 921 and 928, H.L.(E.) and Lord Scarman in *Reg. v. Hancock* [1986] A.C. 455, 473, H.L.(E.) applied.

Director of Public Prosecutions v. Smith [1961] A.C. 290, H.L.(E.) disapproved.

(2) That in F.'s case the proviso to section 12(1) of the Criminal Code (Amendment) Act 1921 as amended by section 8(*c*) of the Criminal Appeal Act 1969 could not be applied, and so a verdict of manslaughter would be substituted for that of murder and the case remitted to the Staff of Government Division (Criminal Jurisdiction) to determine the appropriate sentence; but that despite the misdirection M. had properly been convicted of murder since intention had not been in issue so that no miscarriage of justice had occurred and the proviso to section 12(1) as amended would be applied (post, p. 596C–D, E–F, F–G).

Decision of the Staff of Government Division (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man reversed in F.'s appeal but affirmed in M.'s appeal.

The following cases are referred to in the judgment of their Lordships:

Australian Consolidated Press Ltd. v. Uren [1969] 1 A.C. 590; [1967] 3 W.L.R. 1338; [1967] 3 All E.R. 523, P.C.

de Lasala v. de Lasala [1980] A.C. 546; [1979] 3 W.L.R. 390; [1979] 2 All E.R. 1146, P.C.

Director of Public Prosecutions v. Smith [1961] A.C. 290; [1960] 3 W.L.R. 546; [1960] 3 All E.R. 161, H.L.(E.)

Hardy v. Motor Insurers' Bureau [1964] 2 Q.B. 745; [1964] 3 W.L.R. 433; [1964] 2 All E.R. 742, C.A.

Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.)

Reg. v. Hancock [1986] A.C. 455; [1986] 2 W.L.R. 357; [1986] 1 All E.R. 641, H.L.(E.)

Reg. v. Hyam [1975] A.C. 55; [1974] 2 W.L.R. 607; [1974] 2 All E.R. 41, H.L.(E.)

Reg. v. Moloney [1985] A.C. 905; [1985] 2 W.L.R. 648; [1985] 1 All E.R. 1025, H.L.(E.)

Rookes v. Barnard [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.)

The following additional cases were cited in argument:

Reg. v. Cunningham [1982] A.C. 566; [1981] 3 W.L.R. 223; [1981] 2 All E.R. 863, H.L.(E.)

Reg. v. Rymell [1954] Crim.L.R. 60, C.C.A.

Reg. v. Ward [1956] 1 Q.B. 351; [1956] 2 W.L.R. 423; [1956] 1 All E.R. 565, C.C.A.

Rex v. Lumley (1911) 22 Cox C.C. 635

Rex v. Philpot (1912) 7 Cr.App.R. 140, C.C.A.

Rex v. Steane [1947] K.B. 997; [1947] 1 All E.R. 813, C.C.A.

Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1986] A.C. 80; [1985] 3 W.L.R. 317; [1985] 2 All E.R. 947, P.C.

Appeals (Nos. 30 and 34 of 1986) with special leave by the defendant, Graham Ralph Frankland, from a judgment of the Staff of Government

A Division (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man (Glidewell J.A. (President) and D. D Brown Q.C., Acting Deemster) given on 1 July 1980 dismissing his appeal against his conviction for murder, contrary to section 18 of the Criminal Code Act 1872, in the Court of General Gaol Delivery at Douglas on 17 April 1980 before Deemster Luft and a jury; and by the defendant, Stephen Philip Moore, from a judgment of the Staff of Government Division B (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man (Deemster Luft, Clerk of the Rolls, and Hytner J.A.) given on 18 February 1983 dismissing his appeal against his conviction for murder, contrary to section 18 of the Criminal Code Act 1872, in the Court of General Gaol Delivery at Douglas on 1 December 1982 before Deemster Corrin and a jury.

C The facts are stated in the judgment of their Lordships.

George Carman Q.C. and *Mario Addezio* for the defendants. The defendants appeal by consolidated appeals from the judgments of the Staff of Government Division (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man dismissing their appeals against their D convictions for murder. These are the first appeals to the Privy Council from that court against convictions for murder. Both appeals raise the same issue, whether the two juries were misdirected as to the mental element necessary to constitute the offence of murder, the directions given being based on the decision of the House of Lords in *Director of Public Prosecutions v. Smith* [1961] A.C. 290. At the time of the E defendants' trials and appeals against conviction section 6 of the Evidence Act 1983, incorporating section 8 of the English Criminal Justice Act 1967, had not been passed in the Isle of Man.

In the Isle of Man murder as a statutory offence is defined by section 18 of the Criminal Code Act 1872. That definition has been given the same meaning as the common law offence of murder in English law. These appeals should be approached on that basis.

F The directions on malice aforethought in these cases contained three possible alternative types of intent: (1) an intention to kill or cause really serious harm; (2) an intention to do an act knowing that it is highly probable that it will cause death or really serious injury; and (3) an intention to do something unlawful knowing the circumstances, whether the defendant realised it or not, which would render it likely G that the act would cause really serious harm. Directions (2) and (3) are based essentially on *Director of Public Prosecutions v. Smith* [1961] A.C. 290 and they are wrong in law.

The crime of murder is a crime of specific intent and requires a proof of intent to kill or to cause a really serious harm. This has always been the true position, and nothing less will suffice.

There has been a confusion in the authorities in the past in English H law between foresight or appreciation or knowledge on the one hand, and intent on the other. Foresight and knowledge of consequences are different from intent. The true jurisprudential status of concepts of foresight or knowledge of consequences is that they form part of the law

of evidence and are matters for any jury to consider in deciding whether the inference of intent to kill or cause really serious harm can be drawn. A

In so far as *Director of Public Prosecutions v. Smith* [1961] A.C. 290 or other cases introduced foresight or contemplation of consequences as the test for the mental element in murder, that case and cases of the like kind were wrongly decided. That is the effect of the reasoning in *Reg. v. Moloney* [1985] A.C. 905 and *Reg. v. Hancock* [1986] A.C. 455. That reasoning does not depend upon the enactment of section 8 of the Criminal Justice Act 1967. B

If the former submissions are well founded the Board should not apply to either case the proviso to section 12(1) of the Criminal Code (Amendment) Act 1921, as amended by section 8 of the Criminal Appeal Act 1969.

The directions given in relation to the necessary intent were wrong in law. Reliance is placed upon *Reg. v. Moloney* [1985] A.C. 905 and *Reg. v. Hancock* [1986] A.C. 455. These two cases show that in English law, both before and after section 8 of the Criminal Justice Act 1967, in murder foresight was part of the law of evidence whereas intent was a matter of substantive law. Section 8 was merely declaratory of the true common law position. There was considerable criticism of *Director of Public Prosecutions v. Smith* [1961] A.C. 290, and so section 8 of the Act of 1967 was enacted. C D

The true law of the Isle of Man at the time of the commission of the offences with which the defendants were charged depends upon what was the true law of England at that time disregarding any statutory alterations. If *Reg. v. Hyam* [1975] A.C. 55 is in conflict with *Reg. v. Moloney* [1985] A.C. 905 and *Reg. v. Hancock* [1986] A.C. 455 it has been departed from by the House of Lords, although not expressly. [Reference was made to the 14th Report of the Criminal Law Revision Committee, Offences against the Person (1980) (Cmnd. 7844), paras. 27, 30 and 31.] E

The impact of *Reg. v. Moloney* [1985] A.C. 905 and *Reg. v. Hancock* [1986] A.C. 455 on these appeals is that the directions given at the defendants' trials were material misdirections because *Director of Public Prosecutions v. Smith* [1961] A.C. 290 was wrongly decided and the true law of England at the date of trial was as stated in *Reg. v. Moloney* [1985] A.C. 905. F

Stuart McKinnon Q.C., *Mark Strachan* and *William Cain A.-G.*, Isle of Man, for the Crown. With regard to the applicability of English law, there is no express provision in the Isle of Man applying English law to that jurisdiction. The law in the Isle of Man was and is customary law supplemented by statute. Where customary law is silent, the Manx courts for the past 200 years have adopted the common law of England, and so the Isle of Man is a common law jurisdiction by adoption. The Criminal Code Act 1872 sets out a series of offences based on English common law offences. In interpreting section 18 and other sections the Manx courts have applied English common law. G H

In Frankland's case Deemster Luft relying upon *Director of Public Prosecutions v. Smith* [1961] A.C. 290 directed the jury that in relation to intention they could apply an objective test. Sir Iain Glidewell in

A giving the judgment of the Staff of Government Division (Criminal Jurisdiction), after referring to *de Lasala v. de Lasala* [1980] A.C. 546, held that the decision of the House of Lords in *Director of Public Prosecutions v. Smith* [1961] A.C. 290, although not binding on Manx courts, was of high persuasive authority and that the objective test applied in the Isle of Man. In the absence at that time of any statutory equivalent to section 8 of the English Criminal Justice Act 1967 that B decision was correct. The application of *Director of Public Prosecutions v. Smith* was entirely consistent with Manx courts applying the common law of England where Manx law was silent and regarding English decisions as binding unless local conditions or provisions led to a contrary conclusion. It is accepted on behalf of the defendants that the English common law applies to these appeals.

C If the House of Lords independently of any enactment had departed from *Director of Public Prosecutions v. Smith* before the defendants' trials and appeals it would have no longer been the common law of England. But where there has been statutory intervention, such as by section 8 of the Criminal Justice Act 1967, which changes the law, the position is different and although that is the law of England it is not the law in the Isle of Man until an equivalent statutory provision is enacted. D The House of Lords recognised in *Reg. v. Moloney* [1985] A.C. 905 and *Reg. v. Hancock* [1986] A.C. 455 that *Director of Public Prosecutions v. Smith* [1961] A.C. 290 had been overruled by statute and the House of Lords then developed the law of England.

If it is accepted that English law is to be applied and that it includes *Director of Public Prosecutions v. Smith* the Privy Council will consider E itself bound to follow that House of Lords' decision: see *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] A.C. 80. *Director of Public Prosecutions v. Smith* [1961] A.C. 290 is high persuasive authority, and it has been applied in Trinidad for 26 years. The Board should be slow to say that it was wrongly decided. The proper way to change the position is by statute, and that was done in the Isle of Man by section 6 of the Evidence Act 1983.

F It is uncertain what the House of Lords would have decided if section 8 of the Criminal Justice Act 1967 had not been passed. It is not certain that it would have invoked the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 and have departed from *Director of Public Prosecutions v. Smith* [1961] A.C. 290, and the House of Lords might have considered that the matter should be corrected if necessary G by statute. [Reference was made to *Reg. v. Cunningham* [1982] A.C. 566.]

It is not disputed by the defendants that if *Director of Public Prosecutions v. Smith* [1961] A.C. 290 was applicable the directions given in each trial were a correct reflection of what was decided in that case.

The contention that *Director of Public Prosecutions v. Smith* has H been overruled, or correctly interpreted or explained, by *Reg. v. Moloney* [1985] A.C. 905 and *Reg. v. Hancock* [1986] A.C. 455 is incorrect. *Reg. v. Moloney* was based expressly on the fact that *Director of Public Prosecutions v. Smith* had been overruled by section 8 of the

Criminal Justice Act 1967 in respect of an objective test intent in murder. In neither *Reg. v. Moloney* nor *Reg. v. Hancock* was the House of Lords considering a direction involving an objective test of intent. The remarks of Lord Bridge of Harwich in *Reg. v. Moloney* [1985] A.C. 905 after his conclusion, at p. 920, that the verdict was unsafe and unsatisfactory were obiter dicta, and at pp. 921, 928 and 929 he referred to *Director of Public Prosecutions v. Smith* [1961] A.C. 290 as having been overruled by section 8 of the Criminal Justice Act 1967. Also, in *Reg. v. Hancock* [1986] A.C. 455, 473, Lord Scarman specifically referred to the intervention of Parliament by section 8 of the Act of 1967. There is no indication in section 8 that it was not changing the law but was merely declaratory of the true common law position before *Director of Public Prosecutions v. Smith* [1961] A.C. 290. With the passing of section 8 the House of Lords was free to develop the law, whereas otherwise it would have had to consider whether or not to depart from *Director of Public Prosecutions v. Smith,* and one can only speculate what it might have done. [Reference was made to *Reg. v. Hyam* [1975] A.C. 55.]

It was correctly held in *Director of Public Prosecutions v. Smith* [1961] A.C. 290 that in relation to an offence of murder the requirement of malice aforethought was satisfied if the ordinary responsible man would in the circumstances of the case have contemplated or foreseen that grievous bodily harm was the natural and probable result of the accused's unlawful and voluntary act. The ordinary responsible man has to be capable of forming an intent and not insane. In *Director of Public Prosecutions v. Smith* there was a particularly strong Committee and the decision was unanimous. The task their Lordships faced was not to create new law but to consider and apply what they considered to be the existing law. At that time the existing law propounded an objective and not a subjective test. There was then no House of Lords' decision on the matter, and the early authorities were considered: *Reg. v. Ward* [1956] 1 Q.B. 351, *Rex v. Philpot* (1912) 7 Cr.App.R. 140, *Reg. v. Rymell* [1954] Crim.L.R. 60, *Rex v. Lumley* (1911) 22 Cox C.C. 635 and *Rex v. Steane* [1947] K.B. 997. The decision was a serious attempt based on authority to state what the English law then was, and that was the position for six years until the enactment of section 8 of the Criminal Justice Act 1967. The directions given at the defendants' trials were correctly based on *Director of Public Prosecutions v. Smith* [1961] A.C. 290 because an objective test was part of the law of the Isle of Man at that time.

The test for applying the proviso to section 12(1) of the Criminal Code (Amendment) Act 1921, as amended by section 8 of the Criminal Appeal Act 1969, is whether if the jury had been properly directed they would have inevitably come to the same conclusion. In these two cases it is necessary for the Crown to show that any reasonable jury properly directed would have been bound to conclude that each defendant intended to cause the deceased serious bodily harm, or that in doing the acts causing death he knew it was highly probable that they would cause death or serious bodily harm.

It is clear that Frankland did not intend or anticipate that anyone other than himself would release the deceased. It was inevitable that

A anyone of the deceased's age, who was left bound up as he was for over three days, would suffer at least serious bodily harm. Frankland clearly intended to leave the deceased helplessly bound up at least until Frankland's girlfriend had left. Accordingly, the jury would have been bound inevitably to conclude either that Frankland intended to cause serious bodily harm or that he knew that what he did would have that result.

B Moore was found by the jury to have struck a blow or blows of sufficient force to split the child's liver. His defence was that he had not struck the child at all, and so there was issue as to intent on the evidence. Inevitably the jury would have been bound to conclude either that Moore intended to cause serious bodily harm or that he knew his acts would cause serious bodily harm.

C *Strachan* following. In his statement to the police Frankland said that he told the deceased that he would return about Monday night or Tuesday, and so when he committed the relevant act he intended to leave the deceased tied up for a minimum period of three days.

Carman Q.C. in reply. *Director of Public Prosecutions v. Smith* [1961] A.C. 290 and other cases upheld the objective test of foresight as D one method of determining the requisite mental element in the crime of murder. The reason why that was wrong was stated by Lord Diplock in *Reg. v. Hyam* [1975] A.C. 55, 94. In that case Ackner J. had given a foresight direction, but it was a subjective foresight direction. Lord Hailsham of St. Marylebone L.C., at pp. 65–79, in giving the leading speech disapproved of that direction and drew a distinction between foresight of probable consequences and intention. That was the genesis E of the reasoning in *Reg. v. Moloney* [1985] A.C. 905.

Intention alone should constitute the mental element in murder. It would be extremely difficult for juries if they had to consider degrees of probability and what the accused might have contemplated as probable. Foresight is an evaluation of future consequences and it involves no element of choice, whereas intention always involves a choice. In F murder trials it is important that trial judges and juries should be confined to what the accused actually intended. The inference is that *Reg. v. Hyam* [1975] A.C. 55 has been overruled by *Reg. v. Moloney* [1985] A.C. 905 and *Reg. v. Hancock* [1986] A.C. 455. Those two recent decisions provide the clearest possible guidance to judges as to how juries should be directed.

G At the time of the defendants' trials the applicable Manx law in relation to the mental element in murder was governed by the common law of England. By the date of *Reg. v. Hyam* [1975] A.C. 55 the law of England was that it was at least a subjective foresight test. Irrespective of section 8 of the Criminal Justice Act 1967 the House of Lords would have eventually overruled *Director of Public Prosecutions v. Smith* [1961] A.C. 290. The defendants' trials were about 20 years after that H decision and by then the common law of England had changed. The way in which the law has developed shows that the subjective test does not depend upon section 8 of the Act of 1967. The true position is that foresight plays no part in the constituent elements of murder, and the

necessary mental element is an intention to kill or to cause really serious harm.

With regard to the application of the proviso to section 12(1) of the Criminal Code (Amendment) Act 1921, as amended by section 8 of the Criminal Appeal Act 1969, the second and third directions to the jury given at Frankland's trial were both serious and material misdirections, and so the Board should be hesitant to apply the proviso since he never had the opportunity of having a fair trial. The question was whether he intended to cause the deceased really serious harm when he tied up the deceased intending to return to release him on the Monday or Tuesday. It is difficult to say that the jury would inevitably have convicted him if they had been properly directed.

If the jury at Moore's trial had been properly directed they would have taken into account his youth. The injuries inflicted on the child were not as bad as in many baby battering cases in which verdicts of manslaughter have been returned. There was no evidence as to his intention once the jury found that he had struck the fatal blow, but nevertheless the Board should not apply the proviso.

Cur. adv. vult.

3 March. The judgment of their Lordships was delivered by Lord Ackner.

These consolidated appeals are from judgments of the Staff of Government Division (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man. They are the first appeals from that court against convictions for murder to come before the Privy Council. Frankland was convicted on 17 April 1980 in the Court of General Gaol Delivery (Deemster Luft and a jury) of the murder between 27 September and 3 October 1979 of John Gale Bridson. His appeal was dismissed on 1 July 1980, the judgment being given by Glidewell J.A. (President). Moore was convicted on 1 December 1982 in the Court of General Gaol Delivery (Deemster Corrin and a jury) of the murder on 20 April 1982 of Brian Marcus Battista, a baby aged 16 months. His appeal was dismissed on 18 February 1983, the judgment being given by Hytner J.A. Both defendants had been sentenced to death but those sentences were subsequently commuted to life imprisonment.

Happily, murder is a rare offence in the Isle of Man. The last conviction prior to that of Frankland was in 1973. The last trial before that, and it resulted in an acquittal, was in 1943 and before that it seems unlikely that there had been a conviction for murder for very many years. Since the conviction in 1973 did not result in an appeal, the Frankland appeal was the first appeal against a conviction for murder to the Staff of Government Division (Criminal Jurisdiction) in the 61 years that that court has been in existence.

The essential issue

In the Isle of Man, murder is a statutory offence and is defined by section 18 of the Criminal Code Act 1872:

A "Whosoever shall unlawfully and feloniously kill another, with malice aforethought, shall be guilty of murder, and being convicted thereof shall suffer death as a felon."

It is common ground that this definition has been given the same meaning in Manx law as the common law offence of murder in English law. Both trial judges in directing the jury on the meaning of "malice B aforethought" informed the jury inter alia that they were not concerned with what the accused himself contemplated as the probable result of his unlawful act but were to apply the objective test of what an ordinary reasonable man would in all the circumstances contemplate as the natural and probable result—often described as "the *D.P.P. v. Smith* test." The question at issue is whether that test was part of the common law of England, and therefore part of Manx law, until it was abolished C by section 6 of the Isle of Man Evidence Act 1983, incorporating section 8 of the Criminal Justice Act 1967.

The facts

Frankland.

Glidewell J.A., in his judgment conveniently summarised the facts as follows:

D "The defendant who, at the time of the trial, was aged 28 years, met Mr. Bridson in London when he, the defendant, was in his mid-teens. About 1970 Mr. Bridson, who came from the island, returned to live in Castletown and brought the defendant here to live with him and the relationship between them was such that the defendant knew him as Uncle Jack. The defendant in due course E married and he left Mr. Bridson in about March 1978. But his wife left him at a date which in his evidence he put at December 1979 but must we think have meant Christmas 1978. In the summer of 1979 the defendant was working at an hotel in Douglas when he met and formed a friendship with a Miss Farrell. She was also working in the same hotel and that friendship continued for some F months. At the end of September Miss Farrell returned to her home in Ireland, leaving the Isle of Man on Sunday 30 September. According to the defendant he was intending to marry Miss Farrell though she gave no sign that she was intending to marry him, and the defendant said Mr. Bridson was jealous of the fact that he was intending to marry Miss Farrell and said that he was going to take steps to stop the marriage by telling Miss Farrell that the defendant G had been in borstal and was a 'queer' which is not true. I should say that in 1979 Mr. Bridson was aged 67 years or thereabouts. He was a man who was clearly not in good health. After his death a post-mortem examination revealed that he was suffering from chronic bronchitis and a severe degenerative condition of the lungs and that he had hardening of the coronary arteries. It may well be, of course, that these facts were not known to the defendant, but when H Miss Farrell was asked about his apparent state of health (and what was apparent to her was, of course, apparent to the defendant) she said 'He seemed to me to be a very weak man, he was coughing a lot and he looked very small and delicate.'

"On the evening of Friday 28 September last year the defendant visited Mr. Bridson at his home in Castletown. According to a statement which he made to the police after his arrest, he said he went to try to persuade Mr. Bridson not to speak to Miss Farrell about him and about his past. In that statement he said 'I asked him,' that is Mr. Bridson, 'if he was still going to the airport and he said yes. I said no you are not. I said I would stop him one way or another. We had a row. He said he was still going down to tell her that I was bent, about the cheques, about all my past. One thing led to another so I tied him up. It was in the bedroom. I told him if he did not lie down I would poke him. I threatened him. He lay on the bed. I tied his hands behind his back with a blue necktie, it had gold crests of some description as a pattern. I then tied his ankles together with another tie, I cannot remember that tie. I said just lie on the bed, you can get free. The reason I did this was to keep him there to give me a chance to get my girl away before he could talk to her. I went downstairs then. I thought he would be able to get free later himself. I opened the front door and closed it and waited in the hall to see what he would do. I heard him jump straight off the bed and heard him start screaming. He was not using any words, just yelling. I went upstairs again. I slapped him round the face. I did not punch him or knife him or anything, I just slapped him. I put him back on the bed. I think I then put two handkerchiefs on his mouth, one on his mouth and one across. I had lost my temper. I knew I was losing Monica and it was really getting to me. Then I went downstairs but before that I think I put a necktie around his mouth, but I do not know the colour. By this time I did not know what day it was. Downstairs I saw some lawn mower extension cable on a hook, it was white, it was in the kitchen. I took that. In the dining room on the bottom shelf of a table with a radio on I saw some double sided tape, the tape was brown but the backing was white. I took the tape and the cable upstairs. I used another tie and tied the feet to the hands behind his back. I looped the cable through his legs and tied it to the bed, then I carried on looping it through his arms and his legs and wrapped it round and under the bed. It looped twice right under the bed. This was to stop him getting off the bed and doing the same as before. I think I could demonstrate how I did it but it is hard to describe. Then I put the tape on Jack's mouth, about seven or eight pieces. I left his nose free so that he could breathe. Jack was not struggling then. After I had slapped him on the mouth he realised I was serious, probably saw I was half drunk and decided to be quiet. I told him it was only going to be until Sunday. I told him I was sorry and he nodded as if he understood. I told him I would be back about Monday night or Tuesday and that he could tell the police what had happened after that as it would be immaterial by then, my girl would have gone. He nodded that he understood. Before I left I checked that the lights were off. I took about £70 from his wallet which was in his back pocket. I gave him all the £1 notes back. I told him it would do for his food when he got loose. Jack saw me

doing this, I knew he would not mind. He often gave me money and I told him that when I came back we would sort the money out and everything. When I left it would be about nine o'clock.' And there tied up on that bed Mr. Bridson stayed, no doubt at first in discomfort, very shortly in pain and eventually, it is quite clear, in agony, and in due course he died. The medical evidence was that his death probably took place on the Sunday night, in which case he was there alone for 48 hours before he died, as lonely and as horrifying a death as one can imagine.

"Meanwhile the defendant took Mr. Bridson's car and he took Miss Farrell and some friends out on the Friday night and the Saturday and he spent the money that he had taken from Mr. Bridson on entertaining them and on Miss Farrell. On the Sunday afternoon he took Miss Farrell to the airport, he saw her leave for Ireland. He said about that period, 'On the Friday night I got drunk, the party finished about four o'clock in the morning. On Saturday I got drunk. I knew what I had done, not that I had killed him but that I had tied him up. I knew it was stupid but it was too late then. I felt I wanted to talk about it. On Sunday my girl left for Ireland in the afternoon, I saw her off. I thought of going to let Jack free, I went to the house and drove past twice but there were people about and I got panicky. I could not go in so I drove back to Douglas. Then I stayed in on Sunday night, Monday I drove round. I thought about Jack and that when I let him go he would not be too pleased about it and I was worried about what would happen to me. Today, Tuesday, I went for a drive and got some petrol. I thought I would wait until dark to go down to Jack.'

"In fact on the Tuesday during the morning a neighbour of Mr. Bridson's who had observed that the curtains were still drawn and that milk was standing on the front doorstep became concerned about him, informed the police and a police officer entered the house about mid-day on the Tuesday and found Mr. Bridson dead. The police kept watch in the vicinity and during the Tuesday evening the defendant drove up to the area in Mr. Bridson's car and he was duly arrested. [This is not quite accurate. The defendant was arrested that evening at his home.]

"At his trial he gave evidence which gave an account of these matters very similar to that contained in his statement which he made to the police after his arrest, except for the explanation as to why he took the money. In his statement he said 'When I went up to Jack's on the Friday it was only to reason with him, it was not to do him any malice, just to keep him away from my girl. When I tied him up and gagged him I did not intend him to die. I have been told that Jack is dead and it is a shock to me'."

Moore.

Moore shared a flat with an Italian girl, Clodi Battista, in Douglas. The deceased was Miss Battista's son, who lived with her at the time of his death. On 20 April 1982 Miss Battista went to work at about noon, leaving the deceased, a healthy child but suffering from a cold, in the

care of Moore. She returned at about 5.10 p.m., when the deceased appeared to be asleep. About a half an hour later Moore and Miss Battista had a violent argument, as a result of which Moore left the flat. Shortly afterwards Miss Battista went to the shops, returning five or 10 minutes later, and soon thereafter discovered that her son was dead. The deceased was examined in hospital where marks were found on his stomach, which according to Miss Battista had not been there when she dressed the child that morning. Death had been caused as a result of a blow delivered "with terrific force" to the child's stomach while his back was against some hard surface, causing the liver to split. Moore made three written statements, in the last of which he admitted punching the deceased in temper. He made two similar admissions. It was the Crown's case that only Moore or Miss Battista had had the opportunity to kill the deceased.

Moore's defence was limited to disputing that he was the person who injured and killed the child. He alleged that he had got on well with the deceased, but that Miss Battista had been violent towards her son on previous occasions. He stated in evidence that his second statement had been made as a result of pressure and his third as a result of physical violence and he denied the two oral admissions. He further stated in evidence that between noon and 5.10 p.m. on 20 April 1982 he had not touched the deceased so as to cause him injury.

The direction to the juries

It is common ground that there is no difference in substance between the summing up of the two trial judges. There is therefore no need to set out the relevant extracts from each. Their Lordships content themselves with the following quotation from the summing up of Deemster Corrin in the case of Moore:

> "In order to return a verdict of guilty of murder the prosecution has to prove malice aforethought, and in the absence of that the verdict would be manslaughter.
>
> "Now you will remember that I told you earlier that malice aforethought exists when any one of three attitudes of mind is present. You will have to decide in this case on the evidence whether any one of those attitudes of mind was present, and if you are satisfied so as to be sure that one was present, then malice aforethought has been proved and the defendant would be guilty if you were sure it was the defendant who killed the child. The first attitude of mind is that there was an intention on the part of the defendant to kill the child or to cause him really serious bodily injury. The second attitude of mind is that there was an intention on the part of the defendant to do an act, that is, assault the child, knowing that it was highly probable that it would kill him or cause him really serious bodily injury. Now in both those attitudes of mind it is the defendant's intention which really counts. You would have to be satisfied so as to feel really sure that this defendant, Moore in this case, actually intended to kill or do really serious bodily injury to the child, or that he actually intended to attack him in such a way that it was highly probable that he would be killed.

A But even if you are not sure of either of those attitudes of mind on the part of the defendant, there is the third attitude of mind for you to consider. It is the one which was emphasised by Mr. Moyle. If you are satisfied so as to feel sure that this third attitude of mind was present, then malice aforethought would be proved by the prosecution and the defendant would be guilty of murder. The third attitude of mind is different from the other two in that it does not B depend throughout on the actual intention of the defendant. It is constituted if there was an intention on the part of the defendant to do something unlawful to the child knowing the circumstances which, whether he the defendant realised it or not, rendered the act likely to cause death or really serious bodily injury. So you would first have to feel sure that the defendant intended to do something C unlawful to the child, that is, intended to assault him, and if you felt sure of that, then you would have to be satisfied that the defendant committed that unlawful act knowing the circumstances, whether he, the defendant, realised it or not, rendered the act likely to cause death or really serious bodily injury. So in this third test there is no need of the proof of actual foresight on the defendant's part of either death or really serious injury. The defendant might D have intended only a small degree of harm, and he the defendant might fail to foresee that his act was likely to cause death or really serious bodily injury, but in that case malice aforethought would be present. What has to be proved is that the defendant intended, that is, he formed the intention to do something unlawful to the child, it matters not what the defendant himself contemplated in fact as the E probable result, or whether indeed he even contemplated the result, provided in law he was responsible for his actions. If he was responsible, the question is whether the unlawful act of the defendant was of such a type that really serious bodily injury or death was the actual and probable result, and the test for that is not what the defendant himself contemplated, but what the ordinary reasonable man or woman would in all the circumstances of the F case have contemplated as the natural and probable result."

Director of Public Prosecutions v. Smith [1961] A.C. 290

The facts of that much discussed case, in which the victim was a police officer who clung to the side of the defendant's car to prevent the defendant driving off with stolen property, and subsequently fell off in front of another car thus receiving fatal injuries, are too well known to G require detailed recapitulation. In the course of his summing up the trial judge Donovan J. said, as quoted at pp. 299–300:

> "'The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances, including the presumption of law that a man intends the natural and probable consequences of his acts.'"

H Byrne J., in giving the judgment of the Court of Criminal Appeal, commented, at p. 300, that the trial judge at no stage gave the jury any explanation of the meaning or effect of the word "presumption" or that any such presumption might be rebutted. He said, at p. 300:

"Whatever may have been the position last century when prisoners could not go into the witness box and the distinction between presumptions of law and presumptions of fact was not so well defined, it is now clear, as was naturally conceded by Mr. Griffith-Jones [for the prosecution], that the presumption embodied in the above maxim is not an irrebuttable presumption of law.

"The law on this point as it stands today is that this presumption of intention means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn."

Accordingly the conviction was quashed.

When the case went to the House of Lords the Attorney-General, Sir Reginald Manningham-Buller Q.C., submitted, at pp. 306–307:

"The presumption that a man intends the natural and probable consequences of his acts is rebuttable only on proof of insanity, diminished responsibility or incapacity to form an intent. It is not rebuttable simply by evidence that, though the accused was sane and did the acts deliberately, he did not intend grievous bodily harm because he gave way to panic or lost his head or lost his temper. Apart from the exceptions stated, he must be taken to be a reasonable man."

He submitted, at p. 308:

"If he did acts which, in all the circumstances of the case, a reasonable man would say were calculated to cause grievous bodily harm to someone, that is enough to establish intent on his part, and he cannot be heard to say that he did not intend to do grievous bodily harm to the deceased."

He further submitted, at pp. 309–310:

"If a reasonable man would have concluded that the act was calculated or likely or certain to do grievous bodily harm, the jury are bound to conclude that the accused acted with the intent to do grievous bodily harm. . . . While the presumption that a man intends the natural and probable consequences of his acts is rebuttable, it is not rebuttable in the case of acts deliberately done; it is no defence that he did not actually foresee the consequences."

Those clear and forthright submissions were in substance accepted and resulted in the appeal by the Crown being allowed. In the course of the single speech, concurred in by Lord Goddard, Lord Tucker, Lord Denning and Lord Parker of Waddington, Viscount Kilmuir L.C. said, at p. 327:

"The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and

A voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering B from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result."

C Although it has been suggested that the words "in such a case as the present" in the above quotation from the speech of Viscount Kilmuir L.C. made it clear that he was not propounding an objective test and that the test is always subjective (see in particular *Hardy v. Motor Insurers' Bureau* [1964] 2 Q.B. 745 *per* Lord Denning M.R., at pp. 758–759, and Pearson L.J., at p. 764) Mr. McKinnon for the Crown has D throughout these appeals proceeded on the generally accepted view that the House of Lords reversed the Court of Criminal Appeal, because the Court of Criminal Appeal had held that the test was a subjective one and not an objective one. Indeed the strength of the criticism of the decision (as so interpreted), resulted in Parliament imposing the subjective test, both as to foresight of the consequences and as to intention, by enacting section 8 of the Criminal Justice Act 1967.

E In *Reg. v. Hyam* [1975] A.C. 55, 70–71, Lord Hailsham of St. Marylebone L.C. having referred in some detail to the many criticisms from different sources of the decision in *Director of Public Prosecutions v. Smith* [1961] A.C. 290, rejected the suggestion that their Lordships' House should make use of the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 and depart from that decision. He considered that F it was far better to recognise that Parliament in 1967 had appropriately dealt with the main criticism, be it right or wrong, of that decision. Viscount Dilhorne, at p. 85, saw no reason to review the decision because *Hyam* raised no question as to the applicability of the objective test since, in the light of the direction given to the jury and its verdict, the jury were to be taken to have found that the appellant herself knew that it was highly probable that serious bodily harm would be caused.

G However, Lord Diplock in his speech took up the point which was made by Byrne J. giving the judgment of the Court of Criminal Appeal in *Director of Public Prosecutions v. Smith* and cited above. He said, at p. 94:

"It was, I venture to think, a comparable failure to appreciate the significance of the accidents of history in the development of English H criminal law that led this House in the same case to adopt the objective test of intention as to the consequences of a voluntary act, i.e., that part of the decision that is now overruled by the Criminal Justice Act 1967. Intention can only be subjective. It was the actual

intention of the offender himself that the objective test was designed to ascertain. So long as the offender was not permitted to give evidence of what his actual intention was, the objective test provided the only way, imperfect though it might be, of ascertaining this. The Criminal Evidence Act 1898 changed all this. A defendant to a charge of felony became entitled to give evidence in his own defence. The objective test no longer provided the only means available in a criminal trial of ascertaining the actual intention of the offender; but it had been so for so long that this House overlooked the historical fact that the objective test did not define the relevant intention as to the consequences of a voluntary act. It was no more than one means of ascertaining the relevant intention, to which the Criminal Evidence Act 1898 added another—the defendant's own evidence of what his actual intention was."

Clearly, in Lord Diplock's judgment, *Director of Public Prosecutions v. Smith* had wrongly stated the common law.

Two recent decisions of the House of Lords are of particular relevance, although the observations which their Lordships will quote were clearly obiter. In *Reg. v. Moloney* [1985] A.C. 905 Lord Bridge of Harwich gave the sole speech with which all their Lordships agreed. At p. 921, he referred to *Director of Public Prosecutions v. Smith*, quoted the direction given by Donovan J. and stated that the effect of the decision of the House of Lords was:

> "to declare the presumption that a man intends the natural and probable consequences of his acts to be irrebuttable, or, put in other language, to require juries, in deciding whether a person accused of murder had the necessary intention to kill or cause grievous bodily harm, to apply the objective test of the reasonable man, not the subjective test of what was in the mind of the accused man. In this respect the decision was never popular with the profession. It is said to have been widely disregarded by trial judges, directing juries in murder cases, until it was eventually overruled by section 8 of the Criminal Justice Act 1967. . ."

At p. 928, he again referred to *Director of Public Prosecutions v. Smith* and said:

> "A rule of evidence which judges for more than a century found of the utmost utility in directing juries was expressed in the maxim: 'A man is presumed to intend the natural and probable consequences of his acts.' In *Director of Public Prosecutions v. Smith* [1961] A.C. 290 your Lordships' House, by treating this rule of evidence as creating an irrebuttable presumption and thus elevating it, in effect, to the status of a rule of substantive law, predictably provoked the intervention of Parliament by section 8 of the Criminal Justice Act 1967 to put the issue of intention back where it belonged, viz., in the hands of the jury, 'drawing such inferences from the evidence as appear proper in the circumstances.' "

Their Lordships view these observations as being consistent with and supporting the criticism made by Lord Diplock of *Director of Public*

Prosecutions v. Smith quoted above. Lord Scarman in giving the single speech in *Reg. v. Hancock* [1986] A.C. 455, 473, referred to Lord Bridge's comment on *Smith*'s case accepting and paraphrasing it in these terms:

> "that Parliament intervened by section 8 of the Criminal Justice Act 1967 to return the law to the path from which it had been diverted, leaving the presumption as no more than an inference open to the jury to draw if in all the circumstances it appears to them proper to draw it."

Was the "objective test" part of Manx law until May 1983, when section 6 of the Evidence Act 1983 incorporated into the law of the Isle of Man section 8 of the Criminal Justice Act 1967?

Mr. Carman for the defendants submitted to their Lordships that if section 8 of the Act of 1967 had not been passed, the House of Lords would, pursuant to the Practice Direction of 1966, have departed from the decision in *Director of Public Prosecutions v. Smith*, insofar as it had laid down an objective test of intention, well before the defendants had committed these homicides. While their Lordships are prepared to accept that this might have been the case, they do not have to be so satisfied. Decisions of English courts, particularly decisions of the House of Lords and the Court of Appeal in England, are not binding on Manx courts, but they are of high persuasive authority, as was correctly pointed out by Glidewell J.A. in giving the judgment of the Staff of Government Division (Criminal Jurisdiction). Such decisions should generally be followed unless either there is some provision to the contrary in a Manx statute or there is some clear decision of a Manx court to the contrary, or, exceptionally, there is some local condition which would give good reason for not following the particular English decision. The persuasive effect of a judgment of the House of Lords, which has largely the same composition as the Judicial Committee of the Privy Council, the final Court of Appeal from a Manx court, is bound to be very high. Glidewell J.A. cited as authority for this position the well known case of *de Lasala v. de Lasala* [1980] A.C. 546, an appeal from the Court of Appeal of Hong Kong. Lord Diplock said, at pp. 557–558:

> "It has become generally accepted at the present day that the common law is not unchanging but develops to meet the changing circumstances and patterns of society in which it is applied. In *Australian Consolidated Press Ltd. v. Uren* [1969] 1 A.C. 590 it was accepted by this Board that the common law as to the right to punitive damages for tort had of recent years developed in different ways in England and in New South Wales and that neither Australian courts themselves nor this Board sitting on an appeal from an Australian court were bound by the decision of the House of Lords in *Rookes v. Barnard* [1964] A.C. 1129 which limited the categories of cases in which punitive damages could be awarded in England. So too in Hong Kong, where the reception of the common law and the rules of equity is expressed to be 'so far as they are applicable to the circumstances of Hong Kong or its inhabitants' and 'subject to such modifications as such circumstances may

require,' a decision of the House of Lords on a matter which in Hong Kong is governed by the common law by virtue of the Application of English Law Ordinance is not ipso facto binding upon a Hong Kong court although its persuasive authority must be very great, since the Judicial Committee of the Privy Council, whose decisions on appeals from Hong Kong *are* binding on all Hong Kong courts, shares with the Appellate Committee of the House of Lords a common membership. This Board is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England."

Glidewell J.A. correctly took the view that there was nothing in local conditions, much less in local statutes, that should lead the court to the view that the objective test as laid down in *Director of Public Prosecutions v. Smith* [1961] A.C. 290 was not the common law of England and therefore the law of the Isle of Man until Tynwald enacted the contrary in 1983. In reaching this conclusion, Glidewell J.A. expressed his awareness of the criticisms, particularly by academic writers, of *Director of Public Prosecutions v. Smith*. It does not appear, however, that his attention was drawn to Lord Diplock's clear view expressed in *Reg. v. Hyam* [1975] A.C. 55, 94, that the decision was erroneous and how that error came to be made, following in this regard the observations of Byrne J. when giving the judgment of the Court of Criminal Appeal in *Director of Public Prosecutions v. Smith*, at p. 300, which their Lordships have quoted. Moreover Glidewell J.A. did not have the benefit of the very recent observations made by Lord Bridge of Harwich in his speech in *Reg. v. Moloney* [1985] A.C. 905, 921 and 928, which their Lordships have set out above, and those of Lord Scarman in his speech in *Reg. v. Hancock* [1986] A.C. 455, 473, also quoted.

Their Lordships, having had the benefit of extended argument, and, particularly in the light of the recent cases, have concluded that the decision in *Director of Public Prosecutions v. Smith* [1961] A.C. 290, insofar as it laid down an objective test of the intent in the crime of murder, did not accurately represent the English common law. It therefore follows that the trial judges in both trials were in error in directing the jury that they were entitled to ascertain the intent of the accused by reference to an objective test.

The application of section 12(1) of the Criminal Code (Amendment) Act 1921 as amended by section 8 of the Criminal Appeal Act 1969

Section 12(1) lays down the duties and powers of the Court of Criminal Appeal on the hearing of an appeal against a verdict of a jury. It contains, in its amended form, the following proviso:

> "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

A In relation to these two appeals different considerations arise as to whether or not this proviso should be applied. Their Lordships will accordingly deal with each separately.

Frankland. As has already been made apparent from the statement of the facts of Frankland's case, as set out in the judgment of Glidewell J.A. quoted in extenso above, a post-mortem examination of Mr. B Bridson revealed that he was suffering from chronic bronchitis and a severe degenerative condition of the lungs and that he had hardening of the coronary arteries. A very important question in the case was whether Frankland was aware that the deceased was in very poor health. If he was so aware, this would clearly provide strong support for a jury concluding that Frankland must have appreciated that to leave him C trussed up and gagged as he did, even if he did so intending to release him on the Sunday evening after his girlfriend had departed, would inevitably cause him serious bodily injury. As to this aspect of the case Miss Farrell had told the jury, under cross-examination, that the deceased did not appear to be a man in normal health. He seemed to be a very weak man. He was coughing a lot and looked very small and delicate.

D However, a Mrs. Holmes said he appeared to be in normal health and a Dr. Bourdillon said in evidence that these diseases do not always show symptoms apparent to the layman. Moreover, the deceased's cousin, Mr. J. Bridson, told the court that during the previous 10 years he had never known the deceased to be ill apart from the odd cold. Frankland's evidence was to the effect that he thought that the deceased E was a healthy man and that it did not occur to him that the binding and gagging would cause him any really serious bodily injury. What he thought it would do was to make him feel sore. All he wished to do was to keep the deceased away from his girlfriend until she left the island. In directing the jury on the law, the trial judge gave what he described as three "examples" of malice aforethought. It is the third example that expressed the objective test. He said:

F

> "The third example is an intention on the part of the defendant to do something unlawful to a person knowing the circumstances which, whether he realised it or not, rendered the act likely to cause death or really serious bodily injury. Now in this third example there need be no proof of actual foresight on the defendant's part of either death or really serious bodily injury. G The defendant might intend only a small degree of harm and he, the defendant, might fail to foresee that the act was likely to cause death or serious bodily harm, but in that case he would still be guilty. It must be proved that the defendant intended, that is, he formed the intention to do something unlawful to the victim. Now this third case, in that case, it matters not what the defendant himself contemplated in fact as the probable result or H whether indeed he contemplated it at all, provided he was in law responsible and accountable for his actions, that is, he was capable of forming an intent, he was not insane. If he was so accountable, the question is whether the unlawful and voluntary

act was of such a kind that really serious bodily harm was a natural and probable result, and the test for that is what the ordinary reasonable man would in all the circumstances of the case, have contemplated as the actual and probable result."

Quite clearly on this direction it was open to the jury totally to ignore the defendant's evidence not only as to his intentions, but as to his knowledge and appreciation of the deceased's physical condition and to have convicted him of murder on the basis that an ordinary reasonable man would have foreseen that what he did was likely to cause serious bodily harm. That certainly would have been a miscarriage of justice. Their Lordships are not satisfied that, if the jury had not been so misdirected, they would inevitably have convicted Frankland of murder rather than manslaughter. If properly directed they could have concluded that he, Frankland, might not have been aware of the deceased's physical state of health and that in his desperation to prevent the deceased making serious and untrue allegations about him to his girlfriend he gave little or no thought to the serious consequences which his unlawful actions might or would involve. In these circumstances their Lordships do not consider that this is a proper case for the application of the proviso. Accordingly they will humbly advise Her Majesty that this appeal should be allowed, that the conviction for murder should be quashed, that a verdict of guilty of manslaughter should be substituted and that the appeal should be remitted to the Staff of Government Division (Criminal Jurisdiction) of the High Court of Justice of the Isle of Man for consideration of the appropriate sentence to be imposed.

Moore. Moore's defence raised only one issue namely whether or not it was he who had struck the blow to the child's abdomen, which because of its "terrific force" split his liver. The jury, by its verdict, rejected Moore's evidence and concluded that he killed the child. There was no evidence before the jury of what Moore intended when he so brutally struck the child. In such circumstances the jury were obliged to ask themselves what would a man of Moore's age and intelligence have realised would have been the result of his actions. Their Lordships have no hesitation in concluding that it was an irresistible inference that he would have realised that at least serious bodily harm to the child was inevitable.

Their Lordships are accordingly satisfied that, notwithstanding the misdirection in Moore's case, there was no miscarriage of justice and accordingly they will humbly advise Her Majesty that his appeal should be dismissed.

Solicitors: Alan Taylor & Co.; Charles Russell & Co.

S. S.

[HOUSE OF LORDS]

KLEINWORT BENSON LTD. . . . . APPELLANTS

AND

BARBRAK LTD. . . . . RESPONDENTS

KLEINWORT BENSON LTD. . . . . APPELLANTS

AND

T. CHOITHRAM & SONS (LONDON) LTD. . . RESPONDENTS

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AND

CHEMICAL IMPORTATION AND DISTRIBUTION STATE ENTERPRISES . . . . . RESPONDENTS

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AND

SHELL MARKETS (M.E.) LTD. . . . . RESPONDENTS

[CONSOLIDATED APPEALS]

[On appeal from THE MYRTO (No. 3)]

1987 Feb. 4, 5; April 8

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Brightman, Lord Templeman and Lord Oliver of Aylmerton

Practice—Writ—Extension of time—Costs of discharging cargo—Dispute as to whether cargo-owners liable—Mortgagee bank issuing writ against 164 cargo-owners—Writ not served pending resolution of dispute—Bank's intention of saving legal costs—Applications for extension of validity of writ—Second application made after limitation period expired—Whether application to extend validity of writ to be granted—R.S.C., Ord. 6, r. 8(2)[1]

Ships' Names—Myrto

The *Myrto* was mortgaged to the plaintiff bank to secure loans, and in January 1977 the bank arrested her in an Admiralty action in rem to enforce the mortgages. Brandon J. ordered that the ship be appraised and sold pendente lite. To enable the ship to be sold by the Admiralty Marshal it was first necessary that cargo belonging to some 200 different owners be discharged. A dispute arose between the bank and certain of the cargo-owners as to whether the cost of discharging the cargo should be borne by the bank or the cargo-owners. Varying an order of Brandon J., the Court of Appeal held that the cargo should be discharged initially at the expense of the bank; thereafter, cargo-owners who wished to obtain delivery were to make a cash deposit or give an undertaking backed by guarantee to indemnify the bank if they were ultimately held liable to pay the cost of discharge. The cargo was subsequently discharged.

[1] R.S.C., Ord. 6, r. 8: see post, p. 615D–E.

The cost of discharge came to over £161,000, which exceeded the total amount of the cash deposits and undertakings and also exceeded the proceeds of sale of the ship. The bank was unable to negotiate a settlement of all its claims against the cargo-owners. Being anxious to minimise the costs of any recovery that it might be able to make against them it decided first to institute proceedings ("the Sahami proceedings") against the cargo-owner with the greatest amount of cargo and seek to establish in those proceedings the principle that all cargo-owners were liable to repay to the bank their proportionate shares of the total cost of discharge. The earliest date, however, that could be obtained for trial of those proceedings was January 1984, by which time the bank's claims against the other cargo-owners and guarantors would have become time-barred. Accordingly, to protect its position the bank on 4 November 1982 issued a writ ("the omnibus writ") against 164 other defendants. Being anxious not to serve the writ at that stage with all the legal costs that would thereby be incurred, on 20 October 1983 it applied to the Admiralty Registrar ex parte for an extension of its validity, which was granted for 12 months from 4 November 1983 to 3 November 1984. On 13 February 1984 Sheen J. in the Sahami proceedings held that the cost of discharge should be borne by the cargo-owners, and no appeal was brought against his decision. The process of calculating the amounts due from each cargo-owner took some time to complete, and accordingly on 19 October 1984, again with a view to saving legal costs, the bank applied ex parte for a further extension of the validity of the writ, which was granted for three months from 4 November 1984 to 3 February 1985. On 24 January 1985, the bank served the omnibus writ on the 164 defendants. Its plan achieved substantial success in that 35 cargo-owners or their guarantors paid the amounts claimed against them before the omnibus writ was served and following service 79 of the remaining cargo-owners did not defend the action. Five cargo-owners, however, applied to the Admiralty Registrar for the extensions of the validity of the writ to be set aside. Their applications were dismissed by the registrar, and appeals by four of them were dismissed by Sheen J. The Court of Appeal, however, allowed appeals by the four and set aside the extensions.

On appeals by the bank:—

Held, allowing the appeals, that on the true construction of R.S.C., Ord. 6, r. 8(2) the power to extend the validity of a writ should only be exercised for good reason; that whether there was good reason depended on all the circumstances of the particular case and the question whether an extension should be allowed was accordingly one for the discretion of the judge, who was entitled to have regard to the balance of hardship between the parties and the possible prejudice to the defendant if an extension were allowed; and that in all the circumstances of the present case, which was a wholly exceptional one and where the bank's plan had been designed to save unnecessary proceedings and legal costs without any prejudice to the respondents, there had been good reason for allowing the two extensions of the omnibus writ (post, pp. 610D–E, 622C, G–H, 623B–C, G—624C, D–E).

Jones v. Jones [1970] 2 Q.B. 576, C.A. approved.

Battersby v. Anglo-American Oil Co. Ltd. [1945] K.B. 23, C.A. and *Heaven v. Road and Rail Wagons Ltd.* [1965] 2 Q.B. 355 considered.

Per curiam. The power to extend the validity of a writ is not restricted to cases where there has been difficulty in effecting service. Exceptional circumstances are not required. In cases where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired the applicant must give a satisfactory explanation of his failure to apply before the validity of the writ expired (post, pp. 610D–E, 621G—622A, 623B, 624D–E).

Decision of the Court of Appeal reversed.

The following cases are referred to in their Lordships' opinions:

Baker v. Bowketts Cakes Ltd. [1966] 1 W.L.R. 861; [1966] 2 All E.R. 290, C.A.

Battersby v. Anglo-American Oil Co. Ltd. [1945] K.B. 23; [1944] 2 All E.R. 387, C.A.

Heaven v. Road and Rail Wagons Ltd. [1965] 2 Q.B. 355; [1965] 2 W.L.R. 1249; [1965] 2 All E.R. 409

Jones v. Jones [1970] 2 Q.B. 576; [1970] 3 W.L.R. 20; [1970] 3 All E.R. 47, C.A.

Myrto, The [1977] 2 Lloyd's Rep. 243; [1978] 1 Lloyd's Rep. 11, C.A.

Myrto, The (No. 2) [1984] 2 Lloyd's Rep. 341

Myrto, The (No. 3) [1985] 2 Lloyd's Rep. 567

Osborne v. Distillers Co. Ltd. (1967) 112 S.J. 50, C.A.

Stevens v. Services Window & General Cleaning Co. Ltd. [1967] 1 Q.B. 359; [1967] 2 W.L.R. 939; [1967] 1 All E.R. 984

The following additional cases were cited in argument

Afro Continental Nigeria Ltd. v. Meridian Shipping Co. S.A. (The Vrontados) [1982] 2 Lloyd's Rep. 241, C.A.

Aiden Shipping Co. Ltd. v. Interbulk Ltd. [1986] A.C. 965; [1986] 2 W.L.R. 1051; [1986] 2 All E.R. 409, H.L.(E.)

Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 Q.B. 229; [1968] 2 W.L.R. 366; [1968] 1 All E.R. 543, C.A.

Ameropa A.G. v. Marcoluna Shipping Corporation S.A. (The Angelina the Great) [1983] 1 Lloyd's Rep. 591, C.A.

Austin Rover Group Ltd. v. Crouch Butler Savage Associates [1986] 1 W.L.R. 1102; [1986] 3 All E.R. 50, C.A.

Birkett v. James [1978] A.C. 297; [1977] 3 W.L.R. 38; [1977] 2 All E.R. 801, H.L.(E.)

Devon and Cornwall Housing Association Ltd. v. Donald Butler Associates (unreported), 23 January 1986; Court of Appeal (Civil Division) Transcript No. 51 of 1986, C.A.

Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd. [1967] 2 Q.B. 86; [1967] 2 W.L.R. 856; [1967] 1 All E.R. 934, C.A.

Libra Shipping and Trading Corporation Ltd. v. Northern Sales Ltd. (The Aspen Trader) [1981] 1 Lloyd's Rep. 273, C.A.

Madron v. Arun District Council (unreported), 18 June 1985; Court of Appeal (Civil Division) Transcript No. 317 of 1985, C.A.

Portico Housing Association Ltd. v. Brian Moorehead and Partners, The Times, 5 February 1985; Court of Appeal (Civil Division) Transcript No. 62 of 1985, C.A.

Walkley v. Precision Forgings Ltd. [1979] 1 W.L.R. 606; [1979] 2 All E.R. 548, H.L.(E.)
Ward v. James [1966] 1 Q.B. 273; [1965] 2 W.L.R. 455; [1965] 1 All E.R. 563, C.A.
Watney, Combe, Reid & Co. Ltd. v. E. M. Dower & Co. Ltd. [1956] 2 Lloyd's Rep. 129, D.C.
Wilkinson v. Ancliff (B.L.T.) Ltd. [1986] 1 W.L.R. 1352; [1986] 3 All E.R. 427, C.A.
Yew Bon Tew v. Kenderaan Bas Mara [1983] 1 A.C. 553; [1982] 3 W.L.R. 1026; [1982] 3 All E.R. 833, P.C.

CONSOLIDATED APPEALS from the Court of Appeal.

By writ issued on 4 November 1982 the plaintiffs, Kleinwort Benson Ltd. ("the bank"), claimed against each of the first to 140th defendants sums due under or by reason of an undertaking in writing given by or on behalf of each defendant in relation to the proper and respective proportion of the costs and liabilities incurred by the Admiralty Marshal in the discharge of cargo owned by that defendant from the vessel *Myrto* between May and September 1977 and storage of the same, the plaintiffs being entitled under or by reason of those undertakings to be paid by each defendant his proper and respective proportion. Further or alternatively, the plaintiffs' claim against each defendant was for the proper and respective proportion of the costs and liabilities of the Admiralty Marshal in the discharge of cargo owned by that defendant from the vessel *Myrto* between May and September 1977 and storage of the same which costs and liabilities had been paid or discharged by the plaintiffs, the mortgagees of the vessel, the defendants being liable to pay their proper and respective proportions to the plaintiffs because: (1) it had been the duty in law of the defendants and each of them to discharge cargo owned by them from the vessel, the contract of carriage between the defendants and the owners of the vessel having been finally discharged by frustration or breach; alternatively, it had been their duty by reason of the issue of a commission of appraisement and sale by the High Court, which commission could not be executed unless the cargo was discharged; (2) the Admiralty Marshal having paid for the discharge and storage of the cargo his proper and respective proportion of the costs and liabilities thereof had become due from each defendant to the marshal; (3) on the proper construction of the undertakings and of an order of the Court of Appeal dated 27 May 1977 the sums due to the marshal were now due to the plaintiffs; (4) the plaintiffs were subrogated to the marshal's rights against the defendants; (5) the discharge and storage of the goods had increased their value to the defendants and/or conferred material benefits on the defendants to the extent of their proper and respective proportions; (6) each defendant by requesting and receiving its goods from the marshal (as each had done) had impliedly agreed to pay to the marshal and/or the plaintiffs the sum in question. Further or alternatively, the plaintiffs claimed against each defendant: (1) a declaration that the proper and respective proportion of the costs and liability incurred by the Admiralty Marshal in acting under an order of Brandon J. dated 17 May 1977 (*The Myrto*) as varied by the order of the Court of Appeal dated 27 May 1977 [1978] 1 Lloyd's Rep. 11 was

due from each defendant to the plaintiffs; (2) an order that the proper and respective proportion of the costs and liabilities in respect of each defendant be assessed and/or quantified by the registrar; (3) payment of the sums so found to be due; (4) interest pursuant to statute.

The bank claimed against each of the 141st to 164th defendants sums due under or by reason of an undertaking in writing by or on behalf of each defendant whereby each defendant had guaranteed to the plaintiffs the payment to the plaintiffs by one or more of the first to 140th defendants of the proper and respective proportion of the costs and liabilities incurred by the Admiralty Marshal in acting under the order of Brandon J. dated 17 May 1977 as varied by the order of the Court of Appeal dated 27 May 1977 as might be held to be due from the defendant or defendants whose obligations had been so guaranteed. The proper and respective proportions of such costs and liabilities being due from each of the first to 140th defendants to the plaintiffs by reason of the facts and matters previously set out, each of the 141st to 164th defendants was liable to pay to the plaintiffs the proper and respective proportion of each of the first to 140th defendants whose obligations had been guaranteed by it.

The writ not having been served on the defendants, extensions of its validity were granted by the Admiralty Registrar ex parte on 20 October 1983 for 12 months from 4 November 1983 to 3 November 1984 and on 19 October 1984 for three months from 4 November 1984 to 3 February 1985. The writ was served on all the defendants on 24 January 1985, and five of the defendants, viz. the 113th, Chemical Importation and Distribution State Enterprises, Baghdad, Iraq, the 131st, Shell Markets (M.E.) Ltd., Dubai, United Arab Emirates, the 108th, T. Choithram & Sons (London) Ltd., the 130th, Mohamed Rafi Mohamed Saeed Ahmadi & Sons, Dubai, and the 103rd, Barbrak Ltd., then applied to the Admiralty Registrar for the extensions of its validity previously granted to be set aside. The Admiralty Registrar (Mr. Registrar Rochford) on 16 May 1985 dismissed the applications. On 30 July 1985 Sheen J. (*The Myrto (No. 3)*) [1985] 2 Lloyd's Rep. 567 dismissed appeals by the 113th, 131st, 108th and 103rd defendants. Those defendants appealed to the Court of Appeal (Sir John Donaldson M.R. and Dillon L.J.), who on 13 December 1985 allowed the appeals and set aside the extensions.

The Court of Appeal refused the bank leave to appeal, but on 1 May 1986 the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Templeman and Lord Ackner) allowed a petition by it for leave. By order of the House of Lords dated 21 May 1986 the appeals were consolidated.

The facts are set out in the opinion of Lord Brandon of Oakbrook.

David Grace Q.C. for the bank. The first issue is whether the discretion conferred on the court to extend the time for service of a writ pursuant to R.S.C., Ord. 6, r. 8 is a discretion that can be exercised only in a case where there is difficulty in serving the writ or whether it can be exercised in other circumstances also. The sole ground of the judgment of the Court of Appeal is, on analysis, that the judge cannot

extend the time for service unless there are exceptional circumstances giving rise to difficulties in serving the writ: the discretion is so limited as a matter of law.

The Court of Appeal's approach is wrong in principle as a matter of statutory construction. It is contrary to the principles of statutory interpretation to read in words that are not there: see *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965; *Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd. ("The Pegasus")* [1967] 2 Q.B. 86 and *Austin Rover Group v. Crouch Butler Savage Associates* [1986] 1 W.L.R. 1102. There is no trace in the wording of the rules of any principle that their purpose is to deal with difficulty of service, still less that their paramount or exclusive purpose is to deal with that difficulty. No such principle was suggested by the respondents to the judge or in their notice of appeal. There is no support in the authorities for the proposition that the exercise of the discretion is confined to difficulties of service: see *Battersby v. Anglo-American Oil Co. Ltd.* [1945] K.B. 23. The respondents never had a vested right, because the period of validity of the writ had not expired when the bank made its applications. Difficulty of service is only one of many circumstances in which a writ may need to be renewed. Where rules give a general discretion, it is quite wrong for the courts to impose, as matters of fundamental and paramount principle, fetters that confine the discretion to one small area: see *per* Salmon L.J. in *The Pegasus*, at p. 103A–C. If the Court of Appeal is right, the scope of the discretion is far more restricted under the present rules than it was on the wording of the old rules, although the obvious intention of the Rule Committee was to make it wider. It is the function of appellate courts to lay down guide-lines and principles for the exercise of a wide statutory discretion. It is not their function to remove that discretion altogether by implying words that limit its scope: see *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965. The alteration of the wording of the rule in 1964 was deliberate; its obvious purpose was to confer an unfettered discretion, albeit one to be exercised judicially, on the court. The discretion should be exercised freely and flexibly.

The judgment of the Court of Appeal is contrary to the entire approach of the courts to this branch of the law over the past 40 years. It is in particular wholly irreconcilable with *Jones v. Jones* [1970] 2 Q.B. 576. In that case, the validity of the writ was extended although there was not and had never been any difficulty of service. Nowhere in the judgments is there any reference at all to the "fundamental principle" that validity should not be extended unless there are circumstances affecting service. Had such a fundamental principle been acknowledged, the decision would necessarily have gone the other way. The judgment of the Court of Appeal is also contrary to the policy of the law as it has developed in modern times. That policy has been to give the courts a wide discretion, particularly in interlocutory and procedural matters. That discretion is, unless limited by statute or binding authority, exercised judicially on all the facts of the case by balancing the convenience (or hardship) to the parties of granting or withholding the relief sought. If the judgment of the Court of Appeal is correct, any

judge who extended the validity of a writ save in cases where service was impossible or very difficult would have "erred in principle" whatever the circumstances and whatever the balance of hardship. There would be no room for the exercise of discretion at all outside the very restricted field of difficulty of service. The decision of the Court of Appeal puts an unnecessary fetter on the exercise of the court's power to extend, a power already limited by the existing authorities. The Court of Appeal is putting back into the law words from the old Ord. 8, r. 1, but not the words "or for other good reasons."

The second issue is whether *Heaven v. Road and Rail Wagons Ltd.* [1965] 2 Q.B. 355 was correctly decided. This point is open only in the House of Lords. The bank wishes to support the judgment of Sheen J. on the wider ground that no "exceptional circumstances" and certainly no such circumstances concerning service of the writ need be shown.

By his decision, in the first reported case after the change in the rules, Megaw J. laid down three propositions: (a) where a defendant has acquired an accrued defence under the Limitation Acts really exceptional circumstances are needed for the court to extend the validity of the writ; (b) R.S.C., Ord. 6, r. 8 should continue to be applied as it had been in its old form notwithstanding the change in wording; (c) exceptional circumstances were required before any extension of validity could be obtained; the balance of hardship was rarely, if ever, a factor to be considered. The bank agrees with the first proposition but disagrees with the others.

The second proposition is an error of statutory construction. It was the obvious intention of the Rule Committee to alter the sense of the rule by removing any fetter from the court's discretion. Where wording has been deliberately altered by skilled draftsmen the court ought not to ignore the change.

So far as "exceptional circumstances" are concerned, the bank does not submit that the validity of writs should be extended as of course, but the rule concerning the extension of the validity of writs should be flexibly applied with the reasons for the delay, and the balance of hardship, being the central features. This principle may well not have been apparent (it had certainly not then been developed) in 1964. Ord. 6, r. 8 was then the only operative rule conferring any discretion at all in relation to the commencement (in the broad sense of issue and service) of any proceedings out of time. Section 27 of the Arbitration Act 1950 dealing with extension of time for commencing arbitration was then a dead letter. So exceptional did circumstances have to be to invoke it that it was never used at all. It was, however, revived by the decision of the Court of Appeal in *The Pegasus* [1967] 2 Q.B. 86. It has since been rapidly developed in a large number of cases culminating in *Libra Shipping and Trading Corporation Ltd. v. Northern Sales Ltd. (The Aspen Trader)* [1981] 1 Lloyd's Rep. 273. It works in a flexible and satisfactory manner with the court balancing the hardship to the claimant if he is shut out from pursuing his claim with the hardship to the respondent if he has to fight the claim late. Very similar principles now govern the power to allow plaintiffs in personal injury cases to issue writs out of time and, in the analogous field of delay in pursuing

litigation once started, striking out for want of prosecution, another area of the law that has revived since 1964. A

Megaw J. in *Heaven* cited, as the reason for requiring exceptional circumstances in every case, the fact that in some cases witnesses die or cannot be traced or memories fade. Where the more flexible procedure adopted by the courts in the areas set out above are followed the court considers whether, on the facts, a particular case is one in which the defendant has indeed suffered any prejudice from the death, disappearance or faded memory of witnesses. If he has, the plaintiff cannot proceed. Where (as here) the defendants have suffered no prejudice of any kind, the plaintiff is usually allowed to proceed. This is so even if the cause of the delay has been the error or inadvertence of the claimants or their solicitors: a circumstance that could never give rise to an extension on the principles set out in *Heaven*. B C

Megaw J. did not consider hardship to be a factor. The only hardship to the plaintiff would be being shut out from pursuing his claim, and that arises in every case from the application of the general rule. That reasoning is strikingly similar to the reasoning of the Divisional Courts that resulted in a very restricted meaning being ascribed to "undue hardship" in arbitration cases: see *Watney, Combe, Reid & Co. Ltd. v. E. M. Dower & Co. Ltd.* [1956] 2 Lloyd's Rep. 129. Those cases, however, were overruled in *The Pegasus*, which decided that the true test was whether the claimants would suffer greater hardship than the circumstances warranted if the extension were refused. D

Megaw J.'s approach is unduly restricted and inflexible. Plaintiffs can be shut out when they are a few days late as a result of a minor error or oversight and in circumstances where they can suffer great hardship and where the defendants would suffer no hardship at all were the matter to proceed. Closely analogous areas of the law have since been liberalised with wholly beneficial results. The requirement of "exceptional circumstances" as it has been interpreted by Megaw J. in this area is now anomalous. In so far as *Heaven* and *Jones v. Jones* [1970] 2 Q.B. 576 differ, *Jones* is a decision of the Court of Appeal and is to be preferred. The Court of Appeal in *Austin Rover Group Ltd. v. Crouch Butler Savage Associates* [1986] 1 W.L.R. 1102 did not have the benefit of citation of *Ameropa A.G. v. Marcoluna Shipping Corporation S.A. (The Angelina the Great)* [1983] 1 Lloyd's Rep. 591. [Reference was made to *Birkett v. James* [1978] A.C. 297 and *Afro Continental Nigeria Ltd. v. Meridian Shipping Co. S.A. (The Vrontados)* [1982] 2 Lloyd's Rep. 241.] E F G

As to whether Sheen J. exercised his discretion correctly, this question arises only if the bank succeeds on one or other of the issues of principle. The task of assessing on the evidence whether the circumstances are sufficiently exceptional to justify the relief of extension is one of pure discretion. The judge did so decide. On the balance of hardship, he considered that the matter was all one way in favour of the bank. He also decided, correctly, that the respondents had not had an accrued defence under the Limitation Acts at any time, the writ having been valid for service at all times. The bank apprehends that the House will not depart from its usual practice of declining to review the exercise of H

discretion by judges of first instance where that exercise has been approved by the Court of Appeal. That is the case here. If the House does decide to review the judge's exercise of his discretion, the bank relies on the following points in addition to those above: (a) Unlike in most interlocutory disputes, the ultimate merits of this action have already been decided. None of the respondents suggests that their case is different from the Sahami case or has expressed any intention of challenging that decision if this appeal is allowed. (b) The judge was correct in deciding that this was a "wholly exceptional case." The bank and its legal advisers were faced with trying to recover £161,000 from over 140 defendants. The form of undertaking required by the Court of Appeal and the Admiralty Marshal necessarily involved apportioning the costs of discharge amongst the different cargo-owners in such a way that it could be demonstrated that that particular sum was "attributable to their cargo." (c) The guarantors would not be likely to pay unless it were demonstrated to them both that cargo-owners were liable in principle and that a verifiable sum certain was due. (d) Obtaining a decision in principle and presenting in respect of each cargo-owner a precise and verifiable calculation of the sum due from him were essential parts of the course of action adopted by the bank and commended by the court in 1982 as "eminently sensible." Renewals of the writ were also an essential part of that course of action. (e) Sheen J. was right in considering that much potential expense (for defendants as well as for the bank) had been saved by not serving the writ earlier. The Court of Appeal considered that all that had been saved was copying charges and postage. That view, however, depends on an assumption that it is certain that the action would not have proceeded beyond service against any defendant. No such assumption can be made. Had the writ been served at a stage before the guarantors were prepared to pay voluntarily or at least to refrain from defending, they would have instructed solicitors on behalf of the cargo-owners and defended their actions. Under the rules of court each defendant would have had a right to have a statement of claim served on him after acknowledgement of service of the writ. Unless the bank could persuade the court to stay its own action (by no means a foregone conclusion), the action would have had to proceed. It may well not have been necessary to try out 140 cases fully, but the recovery would have been rendered wholly uneconomic by interlocutory activity. (f) If the time for service had not been extended, the bank would have been shut out from pursuing a claim that was certain to succeed because it had adopted a course of proceedings that appeared to the court to be eminently sensible. That is a hardship. The defendants, on the other hand, have suffered no hardship or prejudice at all. There is no question here of witnesses dying or disappearing or memories fading: if there were to be a trial they are no worse off now than they would have been had such a trial taken place in 1977.

Michael Brindle for the 103rd, 108th, 113th and 131st defendants. As to the position on the present state of the authorities, on the law as it stands, the decision of the Court of Appeal is clearly correct (though it is conceded that it should not have said that there was some absolute rule fettering the discretion of the court). It applied the test in *Heaven*

v. Road and Rail Wagons Ltd. [1965] 2 Q.B. 355, frequently upheld and applied by the Court of Appeal in other cases, that exceptional circumstances are required to extend a writ beyond the 12 months allowed by the rules, especially where either (which is not this case) the defendant is deprived of an accrued defence under the Limitation Acts or (which is this case) where the time allowed for service extends beyond the limitation period. All the existing authorities stress the need for exceptional circumstances. Whilst it is true that the courts should not read into statutes or rules of court fetters on discretion that are not specified, it is right that the courts should develop guidelines as to how a general discretion ought, as a matter of principle, to be exercised: see *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965, 975 (Lord Goff of Chieveley) and *Ward v. James* [1966] 1 Q.B. 273. The "exceptional circumstances" test is the correct test. Whilst the most common example of exceptional circumstances is the case where a plaintiff encounters difficulties in service, the respondents do not contend that the power to extend is limited exclusively to cases of difficulties in service. In so far as the judgment of the Court of Appeal might suggest that the power is so limited, the respondents do not seek to support that proposition.

As the Court of Appeal found, there are no circumstances in relation to the second extension that could possibly be regarded as exceptional within the *Heaven* test. The judge had erred in that he had not applied the exceptional circumstances test to the facts surrounding the second extension. He made the error of finding that, because there were certain exceptional features in this litigation, therefore the circumstances justifying extension in October 1984 were exceptional. Nowhere in his judgment did he state what the matters were that were so exceptional in relation to the second extension. Instead, he applied a general "balance of hardship" test. He was influenced in that respect by *Jones v. Jones* [1970] 2 Q.B. 576, 587, where reference is made to the balance of hardship. In relation to that authority, however: (a) the passages relied on are (i) obiter; (ii) inconsistent with *Heaven* and the other Court of Appeal cases on the point; (b) in any event, balancing of hardships only occurs *after* exceptional circumstances have been found; there were plainly exceptional circumstances in *Jones* fully justifying the extension in that case; (c) if necessary, the dicta are wrong, being based on some observations in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229 that were disapproved in *Birkett v. James* [1978] A.C. 297.

If the judge had properly applied the principles in *Heaven*, he could not have found that there were any circumstances in existence in October 1984 sufficiently exceptional to justify the second extension. It is accepted that the fact there were no difficulties of service is not *conclusive*. However, difficulty of service is by far the most usual reason for the extension of writs. There are very few other situations, excepting those where a defendant has agreed to or acquiesced in delay in some way, in which it is right to allow a plaintiff to hold up service beyond the 12 months allowed. The mere existence of a unilateral strategy designed to achieve a marginal cost saving is certainly not sufficient,

especially where that strategy could have been implemented without the need for the extension, as here.

The same point applies to the first extension, if it is necessary to consider it. In addition, it appears that the first extension was granted without *Battersby v. Anglo American Oil Co. Ltd.* [1945] K.B. 23 and *Osborne v. Distillers Co. Ltd.* (1967) 112 S.J. 50, or the passages in *The Supreme Court Practice (1981)* dealing with them, being brought to the court's attention. The judge [1985] 2 Lloyd's Rep. 567, 572 erred in distinguishing those cases by contrasting them with a case "of a plaintiff who holds his hand for the purpose of saving costs which will undoubtedly fall on the defendants, who have at all material times known of the existence of the liability." Not only was that not what the bank was seeking to do, it was also not the case that the costs would undoubtedly fall on the respondents, nor did the bank have any right to take it on itself to confer this supposed benefit on the respondents without consulting them.

As to whether the law should be changed, the bank's approach seems to be that the court should exercise a wholly general discretion to renew writs whenever the particular judge feels it right to do so. Exceptional circumstances are not required, nor should there be any other fetters on the discretion. This change in the law ought not to be made, for the following reasons. (1) The present exceptional circumstances test is firmly implanted in the law, is clear and readily applicable and has been consistently upheld by the Court of Appeal in recent years. *Jones v. Jones*, although open to criticism as set out above, in no way derogates from that basic test. In *Portico Housing Association Ltd. v. Brian Moorehead and Partners*, The Times, 5 February 1985; Court of Appeal (Civil Division) Transcript No. 62 of 1985, *Madron v. Arun District Council* (unreported), 18 June 1985; Court of Appeal (Civil Division) Transcript No. 317 of 1985, *Devon and Cornwall Housing Association Ltd. v. Donald Butler Associates* (unreported), 23 January 1986; Court of Appeal (Civil Division) Transcript No. 51 of 1986, *Austin Rover Group Ltd. v. Crouch Butler Savage Associates* [1986] 1 W.L.R. 1102 and *Wilkinson v. Ancliff (B.L.T.) Ltd.* [1986] 1 W.L.R. 1352 the test was strongly upheld and it was reinforced that the test does not apply exclusively to cases where a right to plead a limitation defence has accrued before an extension is sought. It applies also to the accruing defence: see *Osborne v. Distillers Co. Ltd.*, *Baker v. Bowketts Cakes Ltd.* [1966] 1 W.L.R. 861 and *Portico Housing*. (2) This is an interlocutory appeal on a point of practice. Where, as here, that practice is clear and settled and there are no conflicting decisions creating uncertainty to practitioners, the House should not upset that practice unless satisfied that it is clearly wrong. (3) In fact, the practice is clearly right. Parliament has laid down a six-year limitation period for most actions. The rules allow a further year before the claim need be brought to the attention of the defendant. To provide a general discretion to extend further the time during which the defendant can be kept out of legal proceedings is most undesirable. It would also be contrary to the approach exhibited by cases such as *Walkley v. Precision Forgings Ltd.* [1979] 1 W.L.R. 606 and *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1

A.C. 553. It would effectively extend the limitation period beyond that allowed by Parliament, just as (conversely) some of the cases prior to *Birkett v. James* were held in that case effectively to have imposed a shorter limitation period than that allowed by Parliament. (4) Until the writ is served, there is nothing that a defendant can do to advance the matter. He must simply wait, provided that he has not closed his books, and assumed that the claim will not be pursued. Further, the court cannot obtain any control of the action, by orders for pleadings, discovery, preliminary issues, etc. An increase in the practice of renewing writs will thus lead to greater delay, greater inefficiency and less effective control by the court over legal proceedings. (5) In all such cases, defendants suffer prejudice by being prevented from dealing with claims brought against them, which claims continue to hang over them. Even if there is no specific detriment, such as the death or disappearance of witnesses, it is of itself an important prejudice for a defendant to receive for the first time notification of a claim seven or more years after accrual of the cause of action. This principle is clearly recognised by the Limitation Acts themselves, which, save in the particular case of personal injuries, give a right to defendants where writs are issued after six years irrespective of proof of specific prejudice. It would be anomalous if this were undermined by the device of issuing a writ within time and then obtaining a series of extensions of time for service based on the lack of specific prejudice to a defendant in a particular case. (6) The analogy of section 27 of the Arbitration Act 1950 is not helpful. *Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd.* [1967] 2 Q.B. 86 and subsequent cases grew up to deal with the problems caused by very short contractual time limits (usually in standard terms) that considerably reduced the periods of limitation allowed by statute. Further, section 27 specifically provides for a test based on hardship. What is much more telling is the fact that Parliament has not provided a power to prolong the limitation period for the issue of writs except in personal injury cases. It must be taken to have formed the view that in commercial disputes it should not be necessary for specific prejudice to be established by a defendant in order to claim the protection of the limitation period. It is entirely consistent with this that, once the time has run for issue of a new writ, any existing writ should be brought to the defendant's attention as soon as practicable and that he need not prove specific additional prejudice. (7) Applications for extensions are dealt with ex parte. Thus, the defendant has no chance to make representations at the time when extensions are granted. Not only does this impose a burden on the plaintiff to be full and frank in his supporting affidavit (which did not occur in the present case), but it also makes inappropriate, if not impossible, the general weighing of prejudice such as occurs in cases under section 27 of the Act of 1950 where both parties appear and make representations before an order is made. The fact that the ex parte order might subsequently be set aside does not obviate this difficulty since, on the bank's argument, that would not avoid the judge hearing the ex parte application having to try to balance two sides when he only has one side before him.

A As to the present facts if the law is changed, even if it were to be changed as suggested by the bank the decision of the Court of Appeal should still be upheld. Some good reason, at the very lowest, must be put forward for an extension of time. The bank had no such good reason for the second extension, nor is it possible to discern any cogent reason in the judge's judgment. The second extension is not justifiable, for the following reasons. (i) What is clear is that, by the end of August B 1984, all necessary calculations had been completed, save for the simple matter of interest. That was not, however, what the court was told in the ex parte application in October 1984, which specifically deposed to the allegation that each cargo-owner's percentage liability of the discharge costs had not yet been precisely established. (ii) Even on the bank's strategy, there was no reason why they could not have written to all the C cargo-owners with demands for payment well within the period of the first extension and still had plenty of time to serve the writ. It is a mystery why they did not do so, but September and October 1984 were allowed to slip by. (iii) The impression is given in the bank's petition of appeal that its solicitors had written to all the defendants informing them of the result of the test action prior to the application for the second extension; see also *per* Sheen J. [1985] 2 Lloyd's Rep. 567, 570. D This impression is false. None of the respondents were informed of the test case until 17 January 1985. It is obviously quite impossible for the bank to have written requesting payment of precise sums shortly after June 1984 if, as they themselves depose, they had not worked out the precise sums to be claimed until August 1984 and had still not calculated the appropriate figure for interest at the time when they applied for E their second extension. (iv) The true position is, therefore, that, despite the judgment in the test action and the completion of the calculation in August 1984, no intimation at all was made to the respondents until January 1985. When the second extension was obtained the bank were not, as their present case suggests, engaged in some long and difficult process of communication with the respondents. (v) There was, therefore, no need for the second extension, even on the bank's strategy. When F the letters of demand finally came on 17 January 1985, they were followed by service of the writ on 24 January 1985; thus, only one week was allowed for the respondents to pay voluntarily. If the same one-week period had been allowed in September/October 1984, the writ would have been served in time. That could and should have been done. (vi) Having allowed September and October to slip by, it was in any G event not reasonable to fail to serve the writ within the period allowed by the first extension merely on the basis of the desire to make a marginal saving in costs. If that were right, writs would be extended regularly wherever plaintiffs were able to say that extension might enable settlement to occur, despite the passage of more than seven years from the accrual of the cause of action and the defendant's inability to deal with the case raised against him. (vii) Throughout the bank's H approach there is exclusive concentration on the alleged reasonableness of their strategy from the point of view of their own interests. The respondents' interests were never considered. The respondents Barbrak Ltd. have referred to specific prejudice that the bank's approach has

caused them. There is, however, very substantial prejudice whenever a defendant suddenly receives, long after the expiration of the limitation period, notice of a stale claim that he had been unable to deal with previously. It is no answer to say that the respondents here have no defence. While it is true that any defence is unlikely to prevail before Sheen J., the respondents' liability turns on difficult and novel points of law that are entirely open in the Court of Appeal. The respondents have not yet had to face the decision whether to challenge the bank's claims on their merits, which decision will depend on the result of the present appeal. What is clear is that, if this decision does have to be faced, it will be faced many years after the facts arose. It may be that the respondents would decide not to defend, but they are entitled to be allowed to decide at the appropriate time whether to argue an eminently arguable case in the Court of Appeal without it being assumed for present purposes that they cannot dispute the first instance decision on a "test case." None of the respondents ever agreed to the "test case" procedure, nor were they consulted about it in any way. It is prejudicial to them that they were not afforded the opportunity of playing any part in the process whereby their liability to the bank has been sought to be established until more than seven years after the relevant events. They might, for example, have financed an appeal in the Sahami proceedings. Generally speaking, the books should be closed after seven years.

Their Lordships took time for consideration.

8 April. Lord Keith of Kinkel. My Lords, I have had the opportunity of reading in draft the speech to be delivered by my noble and learned friend Lord Brandon of Oakbrook. I agree with it, and for the reasons he gives would allow these appeals.

Lord Brandon of Oakbrook. My Lords, these appeals arise in an Admiralty action in personam in which Kleinwort Benson Ltd. ("the bank") are the plaintiffs and 164 parties are named as defendants. The writ in the action was issued on 4 November 1982. It has been assumed throughout that the causes of action on which the claims made in the writ are founded arose early in November 1977 and it is not in dispute that the relevant period of limitation is six years. It follows that when the writ was issued the claims made in it were not yet time-barred but they would become so after the expiry of 12 months, that is to say early in November 1983.

The writ not having been served on any of the defendants its validity was twice extended by the Admiralty Registrar. The first extension was granted on 20 October 1983 and was for a period of 12 months from 4 November 1983 to 3 November 1984. The second extension was granted on 19 October 1984 and was for a further period of three months from 4 November 1984 to 3 February 1985. Both applications for extension were made some two weeks or more before the original period of validity of the writ in the first case, and its extended period of validity in the second case, had expired. Because of this, if either extension had been refused, the bank would have had sufficient time in which to serve the writ before its validity expired.

A The writ was ultimately served on all the defendants on 24 January 1985. Five of the defendants then applied to the Admiralty Registrar to set aside the two extensions of the validity of the writ previously granted by him. The Admiralty Registrar dismissed their applications and appeals by four of them to Sheen J. (*The Myrto (No. 3)*) [1985] 2 Lloyd's Rep. 567 were also dismissed. These defendants appealed to the Court of Appeal (Sir John Donaldson M.R. and Dillon L.J.) which by three B orders dated 13 December 1985 allowed the appeals and set aside the two extensions. The bank now appeals with the leave of your Lordships' House against the three orders of the Court of Appeal. The appeal raises questions of general importance with regard to the proper principles to be applied by a judge of the High Court in the exercise of his discretion to extend the validity of an unserved writ in cases where C questions of limitation of action are involved.

My Lords, the case has a long history which it is necessary to set out in some detail. In 1974 the Greek ship *Myrto* ("the ship") was twice mortgaged to the bank to secure substantial dollar loans. In January 1977 the bank brought an Admiralty action in rem against the ship to enforce the mortgages and arrested her in that action. On 4 March 1977 (*The Myrto*) [1977] 2 Lloyd's Rep. 243 an order was made by me, then a D judge of the Admiralty Court, that the ship should be appraised and sold pendente lite. At that time she was laden with a part cargo of general merchandise, shipped under 259 bills of lading, destined for various Middle Eastern and Indian ports of discharge, and owned by about 200 different cargo-owners. In order to enable the ship to be sold by the Admiralty Marshal it was necessary that the cargo should first be E discharged.

There was a dispute between the bank and certain of the cargo-owners (not the respondents) who had intervened in the action as to whether the costs of discharging the cargo should be paid by the bank or the cargo-owners. On 17 May 1977, without deciding that difficult question, I ordered that the cost of discharge should form part of the Admiralty Marshal's expenses of sale. The bank's claim exceeded the F expected value of the ship and the practical effect of my order would therefore have been to put the cost of discharge on the bank, subject to any right of recovery from the cargo-owners which they might later be able to enforce. Under the order which I made the bank, even assuming it to be entitled to recover the cost of discharge from the cargo-owners, would have had no security in respect of such recovery.

G On 27 May 1977 the Court of Appeal (Lord Denning M.R. and Roskill and Shaw L.JJ.) (*The Myrto*) [1978] 1 Lloyd's Rep. 11 varied my order in such a way as to ensure that the bank would have security for any rights of recovery from cargo-owners which they might later be held to have. Under the order as varied the Admiralty Marshal was to discharge the cargo at the expense, initially, of the bank. Thereafter each owner of cargo, if he wished to obtain delivery of it, was to make a H cash deposit, or to give an undertaking (backed by a guarantee by a bank or insurance company) to indemnify the bank in respect of the cost of that cargo's discharge in the event of his being held liable for payment of it. Any cargo not collected was to be sold by the Admiralty

Marshal. The question whether the bank or the cargo-owners were ultimately liable to bear the cost of discharge was left over to be decided later.

Pursuant to the order of the Court of Appeal the cargo was subsequently discharged under arrangements made by the Admiralty Marshal. Some cargo-owners abandoned their cargo. Others made cash deposits or gave undertakings backed by guarantees up to a specified limit and later paid the cost of discharge of their cargo voluntarily. 141 cargo-owners gave undertakings backed by guarantees up to a specified limit but did not pay voluntarily.

The cost of discharging the cargo came to over £161,000. This was much more than had been expected and exceeded the total amounts of the cash deposits and undertakings. It also exceeded the proceeds of sale of the ship. The bank did not know what the total cost of discharge had been until January 1979 when all the relevant accounts were available. The bank was then faced with two problems: first, finding a means of having decided the question whether it or the cargo-owners were ultimately liable for the cost of discharge; and, secondly, apportioning to each of the 141 cargo-owners who had not paid voluntarily his proper share of the total cost of discharge, so that the bank could claim a specific sum from each of them individually.

The bank first tried to negotiate a settlement of all the claims. But since there were 141 cargo-owners concerned, most of them in the Middle East, negotiations proved difficult, and by 25 February 1980 it became apparent that a negotiated settlement could not be reached.

The bank and its advisers were concerned to minimise the costs of any recovery which it might be able to make. If the liability of the cargo-owners could be established in principle, there were a few of them from whom substantial sums could be recovered. From most of the cargo-owners, however, only relatively small sums (say £200 or less) would be recoverable, and any more than minimum expenditure per claim would render recovery unprofitable.

The bank was unable to persuade all the relevant cargo-owners to agree to be bound by a test case properly so called. The bank therefore, on legal advice, decided on the following plan. First, the bank would bring proceedings against the cargo-owner who owned the greatest amount of cargo, and seek to establish in those proceedings the principle that all cargo-owners, including that one, were liable to repay to the bank their proportionate shares of the total cost of discharge. Secondly, on the assumption that such principle could be established, the bank would carry out the extensive task of calculating the shares of the total cost of discharge repayable by each of the cargo-owners concerned. This would enable the bank to present to each cargo-owner or his guarantor the precise sum claimed, together with the basis on which it was calculated, and, in the event of the bank being required to prove the amounts of any claims, put it in a position to do so. By this means the bank hoped to persuade the other 140 cargo-owners to pay without the need for them to be sued at all, or at least, if suing them became necessary, without causing more than the minimum legal costs to be incurred.

In accordance with this plan the bank on 5 June 1980 began proceedings in the Admiralty Court against Sherkate Sahami Sakht, the owner of the greatest amount of cargo. By the beginning of 1982 these proceedings ("the Sahami proceedings") were approaching readiness for trial. Unfortunately, however, it became apparent, on the hearing of a summons for directions, that the earliest date of trial which the court could give was in January 1984. By then the bank's claims against the other 140 cargo-owners would have become time barred, and it was therefore necessary for the bank to protect its position by issuing a writ against all of them. Accordingly on 4 November 1982 the bank issued the writ in the present action ("the omnibus writ"). Of the 164 defendants named in it the first 140 were all the cargo-owners, other than Sherkate Sahami Sakht, against whom claims were outstanding, and the last 24 were banks or insurers who had backed the cargo-owners' undertakings with guarantees.

The omnibus writ could easily have been served on all the defendants before the expiry of its primary period of validity on 3 November 1983. This was so because, by the terms of the undertakings given by the cargo-owners when collecting their cargo, they had all submitted to the jurisdiction of the High Court in England in respect of any claim by the bank against them for their share of the total cost of discharge, and had further agreed to accept service of any proceedings to enforce such claims at the address of their solicitors or other agents in London. The Sahami proceedings, however, could not be tried until January 1984, and the bank was anxious not to serve the omnibus writ, and thereby set further proceedings against 164 defendants in motion, with all the legal costs which would be incurred as a result of that being done. Accordingly the bank, instead of serving the writ, applied successfully to the Admiralty Registrar for the first extension of 12 months to which I referred earlier. The ground of extension was plainly the saving of unnecessary legal costs for all the parties concerned.

The Sahami proceedings were tried by Sheen J. in January 1984 and on 13 February 1984 (*The Myrto (No. 2)*) [1984] 2 Lloyd's Rep. 341 he gave a reserved judgment in which he held that the cost of discharge should be borne by cargo-owners. For reasons which were not fully explained to your Lordships, but which it has not been suggested involved any fault on the part of the bank or its legal advisers, the formal order giving effect to the judgment of Sheen J. was not perfected until 1 June 1984, with the consequence that the time for an appeal (none was in fact brought) did not expire until 28 June 1984.

The next step for the bank and its advisers was to complete the calculation of the precise amounts due from each of the other 140 cargo-owners. It was hoped that, if all the cargo-owners and their guarantors were informed of the result of the Sahami proceedings and presented with precise claims, all or most of such claims would be paid without the necessity of pursuing the action begun by the omnibus writ.

It is the bank's case (challenged to some extent by the respondents as I shall explain later) that the process of calculating the precise amounts, with interest due from each cargo-owner, had by 31 August 1984 reached an advanced stage but required a further period to

complete. Accordingly the bank applied successfully to the Admiralty Registrar for the second extension of the validity of the writ for three months to which I referred earlier. Again it is plain that the ground for extension was the saving of unnecessary legal costs for all the parties concerned.

By 17 January 1985 the process of calculation had been completed. On 21 January 1985 the bank's solicitors sent letters in common form to each of the 140 cargo-owners. In them they stated the result of the Sahami proceedings, set out the amounts with interest of each cargo-owner's share of the total cost of discharge claimed, and asked for payment of such amounts in seven days. Earlier, on 17 January 1985, the bank's solicitors had also sent letters, again in common form, to all the 24 guarantors, giving them similar information, enclosing copies of the letters being sent to the relevant cargo-owners, and indicating that, if the cargo-owners did not themselves pay the claims against them in seven days, the bank would look to the guarantors for payment. On 24 January 1985 the omnibus writ was served on all the defendants. Had it not been so served, its twice-extended validity would have expired on 3 February 1985.

My Lords, the plan which was followed by the bank achieved substantial success. 35 of the 140 cargo-owners or their guarantors paid the amounts claimed before the omnibus writ had been served on them. Following service of the writ 79 of the remaining cargo-owners did not defend the action. The present situation is that, apart from the respondents to this appeal and 10 owners of very small parcels of cargo whose undertakings were guaranteed by a bank now in liquidation, all cargo-owners have paid. This substantial success was achieved without incurring more costs in the present action than those of issuing the omnibus writ in the first place, applying for and obtaining the two extensions, and ultimately serving the writ on all the defendants.

My Lords, before 1962 the power of the High Court to extend the period of validity of a writ, or, as the process was formerly and often still is described, to renew a writ, was governed by a rule of court which has since been superseded, then R.S.C., Ord. 8, r. 1. That rule provided:

> "(1) No original writ of summons shall be in force for more than 12 months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the 12 months, apply to the court or a judge for leave to renew the writ; and the court or judges if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original . . . writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. . . . and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

This rule by its terms only permitted an application for renewal before expiry of a writ. It had to be read, however, with what was then R.S.C., Ord. 64, r. 7, which further provided:

> "A court or a judge shall have power to enlarge or abridge the time appointed by these rules . . . for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

The effect of Ord. 64, r. 7 was to enable a plaintiff to apply for leave to renew a writ even after it had expired, subject to such terms as might be imposed.

In 1962 various revisions of the Rules of the Supreme Court were made. One of those revisions had the effect of replacing the previous Ord. 8, r. 1 set out above with a new rule, presently Ord. 6, r. 8, which has remained in force ever since. That new rule provides:

> "(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for 12 months beginning with the date of its issue . . . (2) Where a writ has not been served on a defendant, the court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the court before that day or such later day (if any) as the court may allow."

Four main differences are to be observed in the new rule, Ord. 6, r. 8, by comparison with the previous rule, Ord. 8, r. 1. First, there is the change of terminology from renewal of a writ to extension of its validity. Secondly, there are no longer any express terms making it a condition of allowing the extension of the validity of a writ that the court should be satisfied that reasonable efforts have been made to serve a defendant who has not been served, or that there is some other good reason for such allowance. Thirdly, there are no longer any express terms concerning the effect of extension in preventing the operation of a statute of limitation. Fourthly, there is an express provision permitting a plaintiff to apply for an extension not only before the validity of a writ has expired, but also after such expiry, if and to the extent that the court allows. This makes it unnecessary for a plaintiff seeking an extension of the validity of a writ after it has expired to rely on any other rule for that purpose.

My Lords, there are three main categories of cases in which, on an application for extension of the validity of a writ, questions of limitation of action may arise, all being cases in which the writ has been issued before the relevant period of limitation, that is to say the period applicable to the cause of action on which the claim made by the writ is founded, has expired. Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired. Category (2) cases are where

the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. Category (3) cases are where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired. In both category (1) cases and category (2) cases, it is still possible for the plaintiff (subject to any difficulties of service which there may be) to serve the writ before its validity expires, and, if he does so, the defendant will not be able to rely on a defence of limitation. In category (1) cases, but not category (2) cases, it is also possible for the plaintiff, before the original writ ceases to be valid, to issue a fresh writ which will remain valid for a further 12 months. In neither category (1) cases nor category (2) cases, therefore, can it properly be said that, at the time when the application for extension is made, a defendant who has not been served has an accrued right of limitation. In category (3) cases, however, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. In category (3) cases, therefore, it can properly be said that, at the time when the application for extension is made, a defendant on whom the writ has not been served has an accrued right of limitation.

It would not be right, however, to regard the question whether, at the time of the application for extension, a defendant on whom a writ has not been served has an accrued right of limitation as the only significant factor in relation to such extension. For, even in category (1) cases and category (2) cases, where there is no such accrued right, the effect of an extension may still enable a plaintiff to serve a writ, which was issued before the relevant period of limitation expired, more than 12 months after the expiry of that period. This necessarily involves a departure, in favour of a plaintiff, from the general rule on which a defendant is entitled to rely that a writ against him, if it is to be effective, must be issued before the relevant period of limitation has expired and must be served on him within 12 months of its issue.

My Lords, there is a considerable body of authority on the principles to be applied by the court where, on an application for the extension of the validity (in which I include the renewal) of a writ, questions of limitation are involved. I do not think that it is necessary for me to examine the whole of this body of authority in detail, but it will be helpful if I refer to the statements of principle which are to be found in the more important reported cases.

Battersby v. Anglo-American Oil Co. Ltd. [1945] K.B. 23 was a category (3) case which fell to be decided by reference to the pre-1962 Ord. 8, r. 1 and Ord. 64, r. 7. In it the Court of Appeal held that the court would not exercise its discretion in favour of renewing a writ if the effect of doing so would be to deprive a defendant of a right of limitation which had already accrued. While that was the actual decision, Lord Goddard, who gave the judgment of the court, made certain observations applicable plainly to category (2) cases and perhaps also to category (1) cases. He said, at pp. 32-33:

> "We conclude by saying that, even when an application for renewal of a writ is made within 12 months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It

A is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of B course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others, but ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development. It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right C that people should be left in ignorance that proceedings have been taken against them if they are here to be served. While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the renewal, his application may very possibly come before a master or judge other than the one who made the order and who will not necessarily know the grounds on which the discretion was exercised."

D It is to be observed that nowhere in this part of his judgment did Lord Goddard refer to the need for the existence of "exceptional circumstances" to justify renewal. Rather he spoke of "good reason" which appears to me to be a less strict requirement. In so doing he was in effect following the wording of Ord. 8, r. 1, which referred to "other good reason."

E *Heaven v. Road and Rail Wagons Ltd.* [1965] 2 Q.B. 355 was another category (3) case. In it Megaw J. had to consider whether the replacement of the previous Ord. 8, r. 1 by the new Ord. 6, r. 8 had affected the requirements for extending the validity of a writ as laid down in *Battersby v. Anglo-American Oil Co. Ltd.* He described those requirements in this way, at p. 361:

> "the principle, or the general rule, to be applied is that leave will F not be given to extend the validity of a writ when application is made retrospectively after the period of 12 months prescribed by the rules has expired, if the effect of so doing would be to deprive the defendant of a defence which he would have had under the relevant statute of limitation supposing that leave to extend were not given and the plaintiff were thus compelled to serve a fresh G writ. To justify the exercise of the discretion there must be exceptional circumstances."

Megaw J. went on to conclude that the principle there set out had not been affected by the change of rule. Later he discussed the question of what would amount to exceptional circumstances. In this connection he said, at p. 365:

H "Clearly, the fact that the plaintiff will be deprived of the possibility of successfully pursuing his claim against the defendants, since the latter can plead the statute to any fresh writ, cannot be a ground. It is not an exceptional circumstance: it is the necessary consequence

of applying the general rule; it is, indeed, the very fact which gives rise to the existence of the rule. Nor can the fact that the defendants knew of the existence of a claim, or knew that a writ had been issued, be a ground. These are in no way exceptional circumstances. Nor can it be a ground that the defendants are unable to show that, if the validity of the writ were to be extended, there would be any specific prejudice or detriment to them in conducting their defence, compared with what their position would have been if the writ had been duly served on them within the 12 months' period. . . . Exceptional cases, justifying a departure from the general rule, might well arise where there has been an agreement between the parties, express or implied, to defer service of the writ; or where the delay in the application to extend the validity of the writ has been induced, or contributed to, by the words or conduct of the defendant or his representatives; or, perhaps, where the defendant has evaded service or, for other reasons without the plaintiff's fault, could not have been served earlier even if the application had been made and granted earlier."

It needs to be stressed that Megaw J. was in these passages from his judgment dealing, and dealing only, with category (3) cases, that being the kind of case which was before him.

The decision of Megaw J. in *Heaven v. Road and Rail Wagons Ltd.* was expressly approved by the Court of Appeal in *Baker v. Bowketts Cakes Ltd.* [1966] 1 W.L.R. 861, another category (3) case. Lord Denning M.R., however, referred, at p. 866, to the need for "sufficient reason" and "good cause," rather than "exceptional circumstances," to justify extension of the validity of a writ in such a case.

In *Stevens v. Services Window & General Cleaning Co. Ltd.* [1967] 1 Q.B. 359 Chapman J. had before him a category (2) case. He held that the principle that the validity of a writ should not be extended unless good and sufficient reason was shown was not affected by the fact that the application for extension had been made before the validity of the writ had expired. It is to be observed that, at p. 367, he used the expression "good and sufficient reason" rather than the expression "exceptional circumstances."

Jones v. Jones [1970] 2 Q.B. 576 was another category (3) case, in which the Court of Appeal held that retrospective extension of the validity of a writ was justified when the reason for failure to serve it earlier was due to an error of law with regard to service reasonably made by a plaintiff's solicitor. Salmon L.J., after referring to *Battersby v. Anglo-American Oil Co. Ltd.*; *Heaven v. Road and Rail Wagons Ltd.* and *Baker v. Bowketts Cakes Ltd.*, said, at p. 583:

"Much depends upon how the words 'really exceptional cases' are construed in relation to the other phrases I have already referred to—'sufficient reason' or 'good cause' or 'good reason.' I suppose that it is only in an exceptional case that 'sufficient reason' or 'good cause' or 'good reasons' exist. It is of great importance that the rules should be observed. The writ should certainly be served within the 12 months, especially if it is not issued until just before the

A expiration of the three-year period, unless there is good cause for extending the time for service . . ."

Later, at p. 584, Salmon L.J. said:

> "Should the order of the judge be reversed, the plaintiff might well be left without any remedy. That hardship must be balanced against the hardship which the judge recognised that the defendant may B suffer as a result of the long delay."

In the same case Sachs L.J. said, at pp. 586-587:

> "Where it is desired to deprive a defendant of his ability to plead a Statute of Limitations, naturally the good cause to be put forward must be strong. It is quite impossible to define the circumstances C which can constitute 'good cause.' It is sufficient in the present case to say that here we find a most unusual set of circumstances. Probably they are and will remain unique."

And further down, at p. 587, he said:

> "In this class of case, where the effects of statutes of limitations have to be taken into account, it may very well be that the climate D of opinion, both in the legislature and in the courts, is . . . moving more towards an ascertainment of how lies the balance of justice between the parties."

I regard this case as a significant milestone on the road of authority with regard to cases of this kind and I do so for two reasons. First, it strengthens the view already adumbrated in earlier cases that what is E required to justify extension is "good cause" or "good reason" rather than the more stringent "exceptional circumstances." Secondly, it introduces for the first time as a relevant consideration the balance of hardship to the plaintiff if extension is refused and hardship to the defendant if it is allowed.

There have been other decisions of the Court of Appeal in other cases since *Jones v. Jones*, but they have all turned on their particular F facts, and I do not think that they do more than apply, without any significant modification, the principles stated in the earlier authorities to which I have already referred.

My Lords, I now turn to examine the grounds on which first Sheen J. (*The Myrto (No. 3)*) [1985] 2 Lloyd's Rep. 567 and then the Court of Appeal decided the present case. Sheen J. first set out the history of the G case and then referred to a number of authorities which had been cited to him. These included three of the cases which I considered earlier: *Battersby v. Anglo-American Oil Co. Ltd.* [1945] K.B. 23; *Heaven v. Road and Rail Wagons Ltd.* [1965] 2 Q.B. 355 and *Jones v. Jones* [1970] 2 Q.B. 576.

At pp. 571-572 the judge referred to a fourth case, *Osborne v. Distillers Co. Ltd.* (1967) 112 S.J. 50, on which Mr. Brindle, counsel for H the four cargo-owners, had relied as authority for the proposition that a plaintiff who delayed service of a writ pending the trial of a test case did not have good cause for the extension of its validity. With regard to that case Sheen J. said:

"That case was one of the cases arising out of the sale of a drug containing thalidomide. The position of the defendants in that case was very different from the instant case. In that case the defendants did not know how many children had been born deformed as a result of the mother taking the drug in question. The service of the writ in that action was the first intimation which the defendants had of the plaintiff's claim. Mr. Brindle submitted that in general a 'test case' is not a good excuse or ground for extending the validity of the writ. It seems to me, however, that there is a world of difference between a plaintiff who for his own purposes delays the service of a writ while awaiting the outcome of a test case in order to save himself expense if the result of the test case shows that he will fail, and the case of a plaintiff who holds his hand for the purpose of saving costs which will undoubtedly fall on the defendants, who have at all material times known of the existence of the liability."

Sheen J. went on to deal with the question of "exceptional circumstances," saying:

"Mr. Brindle submitted that there is a difference between an exceptional case and the exceptional circumstances which are required to justify any extension of the validity of the writ. I see the force of that submission. Nevertheless it seems to me to be relevant that the instant case is a really exceptional case. Ord. 6, r. 8 gives the court a discretion. In exercising that discretion the overriding consideration must be 'the balance of justice between the parties.' That is a phrase I have taken from the judgment of Sachs L.J. in *Jones v. Jones* [1970] 2 Q.B. 576, 587."

Sheen J. then quoted from that judgment and continued:

"When I balance the hardship to the plaintiffs which will follow if they are not entitled to pursue this action against these four defendants against the hardship to each of those defendants if I dismiss the appeal, it seems to me that there can be no doubt as to where the balance of justice lies. Each of the defendants had their cargo delivered to them in 1977. They were not then required to pay for the cost of discharging that cargo, which was their obligation. The four defendants who now appeal against the extension of the validity of the writ have known of the possibility of a claim being made since the time when each of them signed a letter of undertaking to reimburse the plaintiffs for their share of the expenses of discharging the cargo. They were further made aware of the possibility that they would be called upon to pay those costs when in 1979 attempts to reach a compromise were made."

Sheen J. then examined separately the situation of each of the four cargo-owners, recording that three of them did not claim that they had been prejudiced by the delay in service, and finding that, while the fourth claimed to have been so prejudiced, the prejudice alleged was too tenuous to be significant. He then concluded his judgment in this way:

A "While I acknowledge to the full the desirability of plaintiffs pressing on with any claim which they may have against a defendant and whilst I recognise that as a general rule it can only be in exceptional circumstances that the validity of a writ should be extended, it seems to me that the circumstances of this case are wholly exceptional and that it would be most unjust to the plaintiffs to deprive them of such small recovery as they are entitled to make B from the defendants who have appealed against the order of the registrar."

The only judgment given in the Court of Appeal was that of Sir John Donaldson M.R. with which Dillon L.J. said that he agreed. The ground on which Sir John Donaldson M.R. thought it right to reverse the C decision of Sheen J. appears clearly from pp. 10-11 of the transcript of his judgment. He there said, referring to Sheen J.:

"He was applying a general concept of what is just in the circumstances of this case. If that had been the correct approach, of course I would not have dreamed of interfering because it is a matter for his discretion. But I think he was wrong in principle, D because nowhere does he mention what I regard as being the fundamental principle underlying all the statements in the authorities as to the reluctance of the court to extend the period of the validity of the writ. The principle is this. The Limitation Acts give a plaintiff a period during which he is free to issue a writ or not to issue a writ. He is then entitled to 12 months in which to serve it. The effective limitation period for a defendant is thus seven years. E After the expiry of that period, the defendant has a paramount right to be an active party to the action and in a position to apply to the court to have the action dealt with in whatever way seems appropriate to him. Until the writ is served, the defendant has no locus standi and can make no application to the court at all. The real purpose of the power to extend is to deal with difficulties of service. It was never intended simply to enable a plaintiff to deal F with the matter in a slightly cheaper way, if indeed it was cheaper on the facts of this case. It was intended to give the court control of the action at the earliest opportunity, and only to extend the time when the court took control where there were difficulties in service. The cases do of course refer to hardship, and hardship is a factor; but here there is no particular hardship one way or the other. The G fundamental principle that courts should not extend the validity of a writ unless there are exceptional circumstances affecting the service of the writ is, in my judgment, paramount. I would allow the appeal accordingly."

My Lords, as appears from the passage in the judgment of Sir John Donaldson M.R. set out above, the decision of the Court of Appeal was H founded on the proposition that the only ground on which the validity of a writ can properly be extended is that there have been difficulties in effecting service of it. With great respect to Sir John Donaldson M.R. and Dillon L.J., I consider that this proposition cannot be supported,

either as a matter of construction of the relevant rule of court or by reference to the authorities which I examined earlier.

I consider, first, the question of construction, apart from authority. The old rule in force before 1962, then R.S.C., Ord. 8, r. 1, expressly made the exercise by the court of its power to renew a writ conditional on the court being satisfied either that reasonable efforts to serve the writ had been made or that there was some other good reason for renewal. The new rule which replaced that old rule, now Ord. 6, r. 8, is silent with regard to the grounds on which the court is to exercise its power to extend the validity of a writ. How is that silence to be interpreted? On the one hand I cannot think that it would be right to construe the new rule as imposing some stricter or narrower condition for extension than the old rule. On the other hand I cannot think that it would be right to construe the new rule as making such a radical departure from the old rule as to authorise extension as a matter of course. I consider, therefore, that there must be implied in the new rule, as a matter of construction, a condition that the power to extend shall only be exercised for good reason.

I consider, secondly, the authorities, the more important of which I examined earlier. The first point to be observed about those authorities is that all but one of them relate to category (3) cases; one of them relates to a category (2) case; and none of them relates to a category (1) case. This is not surprising for it is only in category (2) cases and category (3) cases that it really matters to a plaintiff whether the court allows an extension or not; in category (1) cases he always has the alternative of issuing a fresh writ.

As I pointed out when examining the authorities, the condition for the exercise by the court of its power to extend the validity of a writ in category (2) cases and category (3) cases is differently expressed in them. In some of the authorities, such as *Heaven v. Road and Rail Wagons Ltd.* [1965] 2 Q.B. 355, it is said that "exceptional circumstances" are needed; in others, such as *Baker v. Bowketts Cakes Ltd.* [1966] 1 W.L.R. 861, it is said that "sufficient reason" or "good cause" is needed. This difference of terminology was considered by Salmon L.J. in *Jones v. Jones* [1970] 2 Q.B. 576, 583, who said, as is plainly right, that it all depends on what is meant by "exceptional circumstances." The main point to be observed, however, is that in none of the authorities is it said that only difficulties of service can justify extension. *Jones v. Jones* is itself a case where matters other than difficulties of service were held to do so.

I think on the whole that it has been unhelpful to put the condition for extension as high as "exceptional circumstances," an expression which conveys to my mind at any rate a large degree of stringency. The old rule in force until 1962 referred to "any other good reason," and I think that the new rule should be interpreted as requiring "good reason" and no more.

The question then arises as to what kind of matters can properly be regarded as amounting to "good reason." The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must

depend on all the circumstances of that case, and must therefore be left to the judgment of the judge who deals either with an ex parte application by a plaintiff for the grant of an extension, or with an inter partes application by a defendant to set aside an extension previously granted ex parte.

Good reason is necessary for an extension in both category (2) cases and category (3) cases. But in category (3) cases the applicant for an extension has an extra difficulty to overcome, in that he must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired.

The decision whether an extension should be allowed or disallowed is a discretionary one for the judge who deals with the relevant application. *Jones v. Jones* shows that, in exercising that discretion, the judge is entitled to have regard to the balance of hardship. In doing so, he may well need to consider whether allowing an extension will cause prejudice to the defendant in all the circumstances of the case. Once a judge has exercised his discretion, it is only on very limited grounds, too well known for it to be necessary for me to set them out here, that an appellate court will be justified in interfering with his decision.

My Lords, I turn now to apply the principles which I have been discussing to the present case. In doing so, I bear in mind that the first application for extension was a category (1) case and the second application for extension was a category (2) case. Counsel for the respondents recognised that the ground on which the Court of Appeal founded its decision in their favour could not be supported. He contended, however, that, on the basis that good reason was required to justify the two extensions, its existence had not been established by the bank. He directed his attack in this respect mainly on the second extension, arguing that, even if the bank's plan was justifiable in principle, the evidence did not show that a second extension was required to enable it to be carried out. He invited your Lordships to examine for yourselves the affidavit evidence which was before Sheen J. and to conclude from it that the bank's advisers had completed all the calculations necessary to enable them to present precise claims to each of the numerous cargo-owners concerned by the end of August 1984. I accept that the affidavit evidence put in by the bank before the Admiralty Registrar, and later with some amplification before Sheen J., was not as clear as it might have been. The evaluation of that evidence, however, was a matter for Sheen J., and it is manifest from his judgment that he was satisfied that the bank reasonably required some further time beyond 3 November 1984 in order to complete its plan. That being so, I do not think that your Lordships should be too astute to pick holes in the affidavit evidence concerned, in order to arrive at an evaluation of it different from that arrived at by the judge.

Sheen J.'s judgment shows that, in exercising his discretion, he took into account the following matters. First, that the case was a wholly exceptional one, as it undoubtedly was. Secondly, that the plan followed by the bank was designed to save, and did save, legal costs which, if they had been incurred, would ultimately have fallen on the cargo-owners. Thirdly, that the respondents had had their cargo delivered to

them in 1977 and had then given undertakings to pay their share of the cost of discharge if it should later be decided that they were liable to do so. Fourthly, that the respondents knew of the possibility of claims being made against them as a result of the bank's unsuccessful attempt to negotiate a settlement in 1979. Fifthly, that none of the respondents had been prejudiced by the delay in service of the writ. Having taken all these matters into account, Sheen J. decided that the hardship to the bank if he set aside the extensions would outweigh the hardship to the respondents if he allowed them to stand.

In my opinion these matters, taken together, constituted material on which Sheen J. could properly hold that there was good reason for allowing the two extensions, previously granted ex parte, to stand. Put shortly the good reason was the saving of unnecessary proceedings and costs achieved without any prejudice to the respondents.

My Lords, for the reasons which I have given I would allow the appeal, set aside the three orders of the Court of Appeal dated 13 December 1985, and restore the order of Sheen J. dated 30 July 1985. I would further order the respondents to pay the bank's costs in this House and in the Court of Appeal.

Lord Brightman. My Lords, I agree with the speech of my noble and learned friend Lord Brandon of Oakbrook and for the reasons given by him I would allow this appeal.

Lord Templeman. My Lords, for the reasons given by my noble and learned friend, Lord Brandon of Oakbrook, I would allow this appeal.

Lord Oliver of Aylmerton. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Brandon of Oakbrook. I agree that the appeal should be allowed for the reasons which he has given.

Appeals allowed with costs in House of Lords and Court of Appeal.
Orders of Court of Appeal of 13 December 1985 set aside.
Order of Sheen J. of 30 July 1985 restored.

Solicitors: Constant & Constant; Peter Faber & Co.; Norton, Rose, Botterell & Roche; Elborne Mitchell & Co.

M. G.

[HOUSE OF LORDS]

LLOYD AND OTHERS . . . . . APPELLANTS

AND

McMAHON . . . . . RESPONDENT

1986 July 9, 10, 14, 15, 16, 17, 18, 21, 22; 31
1987 Jan. 26, 27, 28, 29; Feb. 2, 3; March 12

Lawton, Dillon and Woolf L.JJ.

Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Templeman and Lord Griffiths

Local Government—Member of local authority—Surcharge for wilful misconduct—Failure of local authority to make rate—District auditor notifying members responsible of consideration being given to issue of certificate of surcharge—Members' written representations invited—Oral hearing neither offered nor requested by members—Whether auditor's failure to offer oral hearing vitiating notices—Whether defect curable by appeal to High Court—Local Government Finance Act 1982 (c. 32), s. 20(1)(2)(3)

On 10 April 1985, the district auditor sent a report to the Liverpool City Council expressing concern at the council's failure to make a valid rate for the year 1985–86, drawing attention to the duties of councillors in that regard and repeating warnings that he had made in 1984 regarding the possible consequences for individual councillors, both financial and by way of disqualification, if an inadequate or no rate were made or if there were unreasonable delay in making one. On 21 May 1985, he made a further report giving notice that unless the council made a lawful rate at latest by the end of May he would commence action under section 20 of the Local Government Finance Act 1982[1] to recover any losses occasioned by the failure to make a rate from the councillors responsible for incurring them. Copies of his report were sent to all councillors. On 6 June 1985, the Audit Commission directed that an extraordinary audit be carried out. On 14 June 1985, the council made a rate. On 26 June 1985, the auditor sent to each of the appellant councillors a notice stating that he had to consider whether he should certify the sum of £106,103, or any other sum, consequent on the failure to make a rate or on the delay in making it, as due from them on the ground that a loss or deficiency of such sum had been incurred or caused by their wilful misconduct. The councillors were notified that they might make representations in writing to the auditor before he reached a decision, and the auditor enclosed a note of the various matters to which he had had regard in issuing the notice. The note identified certain specific losses resulting from the delay, totalling £106,103, including the loss of interest on sums that would, but for the delay, have been paid earlier than had been the case. The appellant councillors were identified as persons who by their voting or absence might have failed to discharge their duty as members of the council and might, therefore, be

[1] Local Government Finance Act 1982, s. 20: see post, pp. 704B—705C.

guilty of wilful misconduct resulting in the losses in question. The note stated that the facts showed that there had been no lawful justification for the delay in the making of the rate. The appellant councillors made a collective written and fully documented response to the auditor's notice prepared with the assistance of the council's chief executive. They relied on various matters that they claimed rebutted the auditor's provisional view that they had been guilty of wilful misconduct, including contentions that their obligation had been to make a rate within a reasonable time after the start of the financial year and that it had been reasonable to delay until 14 June 1985 because they had hoped or expected to be able to persuade central government ministers to make larger grants available to Liverpool than they had previously expressed themselves as willing to do, as had in fact occurred in 1984–85, and that they had been influenced throughout by a sincere desire to maximise the resources available to the people of Liverpool and thus to do their best to alleviate the unsatisfactory conditions prevailing there. They did not request an oral hearing. On 6 September 1985 the auditor issued a certificate under section 20(1) of the Act of 1982 certifying the sum of £106,103 to be due from the appellant councillors jointly and severally being the amount of a loss incurred or deficiency caused by their wilful misconduct. The certificate was accompanied by a statement of reasons that dealt in detail with the councillors' representations before concluding that the delay in making a rate had been deliberate, that the intention of the delay had been to attempt to obtain additional money from central government, that there had been no justifiable reason for supposing that the delay would so influence central government, that the council had known that to delay unreasonably had been a wrongful act or had been recklessly indifferent as to whether it was or not and that the loss of £106,103 had been a direct consequence of the delay in making a rate. The appellant councillors were identified as those responsible for the delay. They appealed against the notice to the High Court under section 20(3) of the Act of 1982, and the Divisional Court, dismissing the appeals, concluded that their wilful misconduct causing the loss of £106,103 was fully established, that they had had a sufficient opportunity to meet the case made against them by the district auditor and that there had been no procedural unfairness in the auditor's failure to offer them an oral hearing before reaching his decision. The councillors were invited by the Divisional Court to give oral evidence but declined to do so. The Court of Appeal dismissed further appeals by the councillors, affirming the view of the Divisional Court that they had been guilty of wilful misconduct causing the certified loss and rejecting their submission that the auditor's failure to offer them an oral hearing had made his certificate a nullity.

On appeals by the councillors:—

Held, dismissing the appeals, that in all the circumstances, including the facts that the councillors had not requested an oral hearing and that they had been able to make full written representations to the district auditor, the auditor had not acted unfairly in not affording them an oral hearing and they had not been prejudiced by his failure to do so; that they had had adequate notice of the matters on which the auditor had relied in issuing his certificate; and that he and the courts below had

been entitled to conclude that the loss of £106,103 had been shown to have been caused by the councillors' wilful misconduct (post, pp. 696B—697A, G–H, 702C–D, G—703B, 706C—707A, C—708C, 709H—710A,714C—715B, 716G–H, 717B).

Per curiam. The particular appeal mechanism provided for by section 20(3) of the Local Government Finance Act 1982, considered in its context, is apt to enable the court in its discretion, notwithstanding that it finds some procedural defect in the conduct of an audit that has resulted in a certificate based on wilful misconduct, to inquire into the merits of the case and arrive at its own decision thereon (post, pp. 697C–D, 709F–G, H—710A, 715G—716B, E–F, 717B).

Decision of the Court of Appeal, post, p. 634D, affirmed.

The following cases are referred to in their Lordships' opinions:

Calvin v. Carr [1980] A.C. 574; [1979] 2 W.L.R. 755; [1979] 2 All E.R. 440, P.C.

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935, H.L.(E.)

Leary v. National Union of Vehicle Builders [1971] Ch. 34; [1970] 3 W.L.R. 434; [1970] 2 All E.R. 713

The following additional cases were cited in argument in the House of Lords:

Asher v. Lacey [1973] 1 W.L.R. 1412; [1973] 3 All E.R. 1008, D.C.

Asher v. Secretary of State for the Environment [1974] Ch. 208; [1974] 2 W.L.R. 466; [1974] 2 All E.R. 156, C.A.

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Builders Licensing Board (N.S.W.) v. Sperway Constructions (Sydney) Pty. Ltd. (1976) 51 A.L.J.R. 260

Cinnamond v. British Airports Authority [1980] 1 W.L.R. 582; [1980] 2 All E.R. 368, C.A.

Colton v. District Auditor for Wembley Borough Council (1962) 60 L.G.R. 247, D.C.

Denton v. Auckland City [1969] N.Z.L.R. 256

Fairmount Investments Ltd. v. Secretary of State for the Environment [1976] 1 W.L.R. 1255; [1976] 2 All E.R. 865, H.L.(E.)

George v. Secretary of State for the Environment (1979) 77 L.G.R. 689; 38 P. & C.R. 609, C.A.

Graham v. Teesdale (1981) 81 L.G.R. 117

Jeffs v. New Zealand Dairy Production and Marketing Board [1967] 1 A.C. 551; [1967] 2 W.L.R. 136; [1966] 3 All E.R. 863, P.C.

King v. University of Saskatchewan (1969) 6 D.L.R. (3d) 120; [1969] S.C.R. 678

London & Clydeside Estates Ltd. v. Aberdeen District Council [1980] 1 W.L.R. 182; [1979] 3 All E.R. 876, H.L.(Sc.)

Love v. Porirua City Council [1984] 2 N.Z.L.R. 308

Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578; [1971] 2 All E.R. 1278, H.L.(Sc.)

Maxwell v. Department of Trade and Industry [1974] Q.B. 523; [1974] 2 W.L.R. 338; [1974] 2 All E.R. 122, C.A.

Pickwell v. Camden London Borough Council [1983] Q.B. 962; [1983] 2 W.L.R. 583; [1983] 1 All E.R. 602, D.C.

Powell v. Streatham Manor Nursing Home [1935] A.C. 243, H.L.(E.)
Q.T. Discount Foodstores Ltd. v. Warley General Commissioners [1982] S.T.C. 40
Raymond v. Honey [1983] 1 A.C. 1; [1982] 2 W.L.R. 465; [1982] 1 All E.R. 756, H.L.(E.)
Reg. v. Farmer, Ex parte Hargrave (1980) 79 L.G.R. 676, D.C.
Reg. v. Hackney London Borough Council, Ex parte Fleming (1986) 26 R.V.R. 182, D.C.
Reg. v. Liverpool City Council, Ex parte Ferguson, The Times, 20 November 1985, D.C.
Reg. v. Secretary of State for Transport, Ex parte Gwent County Council [1987] 2 W.L.R. 961; [1987] 1 All E.R. 161, C.A.
Reid v. Rowley [1977] 2 N.Z.L.R. 472
Rex v. Browne, Ex parte Butler [1909] 2 I.R. 333, D.C.
Rex v. Local Government Board, Ex parte Arlidge [1914] 1 K.B. 160, C.A.
Rex v. Roberts, Ex parte Scurr [1924] 2 K.B. 695, C.A.
Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)
Roberts v. Hopwood [1925] A.C. 578, H.L.(E.)
Rothnie v. Dearne Urban District Council (1951) 50 L.G.R. 123, D.C.
Smith and Fawcett Ltd., In re [1942] Ch. 304; [1942] 1 All E.R. 542, C.A.
Taylor v. Munrow [1960] 1 W.L.R. 151; [1960] 1 All E.R. 455, D.C.
Twist v. Randwick Municipal Council (1976) 136 C.L.R. 106; 12 A.L.R. 379; 51 A.L.J.R. 193
Tyrer v. Middleton (unreported), 5 December 1973, D.C.; see *Jones, Local Government Audit Law,* 2nd ed. (1985), App.D. 7, p. 357; 230 E.G. 973
Westminster City Council, In re [1986] A.C. 668; [1986] 2 W.L.R. 807; [1986] 2 All E.R. 278, H.L.(E.)

The following cases are referred to in the judgments of the Court of Appeal:

Asher v. Lacey [1973] 1 W.L.R. 1412; [1973] 3 All E.R. 1008, D.C.
Asher v. Secretary of State for the Environment [1974] Ch. 208; [1974] 2 W.L.R. 466; [1974] 2 All E.R. 156, C.A.
Bushell v. Secretary of State for the Environment [1981] A.C. 75; [1980] 3 W.L.R. 22; [1980] 2 All E.R. 608, H.L.(E.)
Calvin v. Carr [1980] A.C. 574; [1979] 2 W.L.R. 755; [1979] 2 All E.R. 440, P.C.
Denton v. Auckland City [1969] N.Z.L.R. 256
George v. Secretary of State for the Environment (1979) 38 P. & C.R. 609, C.A.
Graham v. Teesdale (1981) 81 L.G.R. 117
Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970, C.A.
Jeffs v. New Zealand Dairy Production and Marketing Board [1967] 1 A.C. 551; [1967] 2 W.L.R. 136; [1966] 3 All E.R. 863, P.C.
King v. University of Saskatchewan (1969) 6 D.L.R. (3d) 120
Leary v. National Union of Vehicle Builders [1971] Ch. 34; [1970] 3 W.L.R. 434; [1970] 2 All E.R. 713
Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578; [1971] 2 All E.R. 1278, H.L.(Sc.)
O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)

Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain (No. 2) [1979] 1 W.L.R. 1401; [1979] 3 All E.R. 545, D.C.
Reg. v. Hackney London Borough Council, Ex parte Fleming [1986] R.V.R. 182, D.C.
Reid v. Rowley [1977] 2 N.Z.L.R. 472
Rex v. Local Government Board, Ex parte Arlidge [1914] 1 K.B. 160, C.A.; sub nom. *Local Government Board v. Arlidge* [1915] A.C. 120, H.L.(E.)
Rex v. Roberts [1908] 1 K.B. 407, C.A.
Rex v. Roberts, Ex parte Scurr [1924] 2 K.B. 695, C.A.
Rothnie v. Dearne Urban District Council (1951) 50 L.G.R. 123, D.C.
Smith and Fawcett Ltd., In re [1942] Ch. 304; [1942] 1 All E.R. 542, C.A.
Twist v. Randwick Municipal Council (1976) 12 A.L.R. 379
White v. Kuzych [1951] A.C. 585; [1951] 2 All E.R. 435, P.C.
Wiseman v. Borneman [1971] A.C. 297; [1969] 3 W.L.R. 706; [1969] 3 All E.R. 275, H.L.(E.)

The following additional cases were cited in argument in the Court of Appeal:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.
Bromley London Borough Council v. Greater London Council [1983] 1 A.C. 768; [1982] 2 W.L.R. 62; [1982] 1 All E.R. 129, H.L.(E.)
Cinnamond v. British Airports Authority [1980] 1 W.L.R. 582; [1980] 2 All E.R. 368, C.A.
Colton v. District Auditor for Wembley Borough Council (1962) 60 L.G.R. 247, D.C.
Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935, H.L.(E.)
Dickson v. Hurle-Hobbs [1947] K.B. 879; [1947] 2 All E.R. 47, D.C.
Glynn v. Keele University [1971] 1 W.L.R. 487; [1971] 2 All E.R. 89
Indian Zoedone Co., In re (1884) 26 Ch.D. 70, C.A.
Jones v. National Coal Board [1957] 2 Q.B. 55; [1957] 2 W.L.R. 760; [1957] 2 All E.R. 155, C.A.
Lamb v. Camden London Borough Council [1981] Q.B. 625; [1981] 2 W.L.R. 1038; [1981] 2 All E.R. 408, C.A.
Maxwell v. Department of Trade and Industry [1974] Q.B. 523; [1974] 2 W.L.R. 338; [1974] 2 All E.R. 122, C.A.
Maynard v. Osmond [1977] Q.B. 240; [1976] 3 W.L.R. 711; [1977] 1 All E.R. 64, C.A.
Pentecost v. London District Auditor [1951] 2 K.B. 759; [1951] 2 All E.R. 330, D.C.
Pergamon Press Ltd., In re [1971] Ch. 388; [1970] 3 W.L.R. 792; [1970] 3 All E.R. 535, C.A.
Pickwell v. Camden London Borough Council [1983] Q.B. 962; [1983] 2 W.L.R. 583; [1983] 1 All E.R. 602, D.C.
Reg. v. Brent London Borough Council, Ex parte Gunning, The Times, 30 April 1985
Reg. v. Ghosh [1982] Q.B. 1053; [1982] 3 W.L.R. 110; [1982] 2 All E.R. 689, C.A.
Reg. v. Hillingdon London Borough Council, Ex parte Puhlhofer [1986] A.C. 484; [1986] 2 W.L.R. 259; [1985] 3 All E.R. 734; [1986] 1 All E.R. 467, C.A. and H.L.(E.)

Reg. v. Secretary of State for the Environment, Ex parte Brent London Borough Council [1982] Q.B. 593; [1982] 2 W.L.R. 693; [1983] 3 All E.R. 321, D.C.

Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)

Roberts v. Hopwood [1925] A.C. 578, H.L.(E.)

Taylor v. Munrow [1960] 1 W.L.R. 151; [1960] 1 All E.R. 455, D.C.

APPEALS from the Divisional Court of the Queen's Bench Division.

By notices of motion dated 4 October 1985, 49 councillors of the Liverpool City Council including the appellant David John Lloyd sought by way of appeal an order that the certificate dated 6 September 1985 of the respondent, Thomas Irving McMahon, as district auditor, that the sum of £106,103 was due from the councillors jointly and severally, being the amount of loss incurred or deficiency caused by their wilful misconduct, be set aside and discharged, on the grounds that (a) the auditor had been wrong to conclude that the councillors had delayed in making a rate in order to use delay itself as a weapon or lever "to prise additional money from central government;" (b) alternatively, he had been wrong to conclude that that would have been a breach of duty, since delay for such a reason would have been a lawful exercise of the councillors' discretion, there being no legal requirement to make a rate by any particular date; (c) he had been wrong to conclude that there had been any loss to the council in the respects alleged and that, if there had been such a loss, it had been caused by the councillors, the loss having been caused by the unilateral and unlawful action of the Department of Health and Social Security and of the Treasury Valuer who each had not been entitled to withhold material payments to the council; alternatively, if those payments had been voluntary and the Department of Health and Social Security and/or the Treasury Valuer had not been obliged to pay them, the withholding of them had not been, and had not been capable of being, a loss caused by the councillors' misconduct; (d)(i) alternatively, if the alleged loss had been caused by the councillors, the auditor had been wrong to conclude that the same had been the result of wilful misconduct or any misconduct by them, or any mala fides on their part as was implied by him; (ii) he had been wrong not to conclude that in the exercise of their discretion as to when to carry out their duty to make a rate (there being no duty setting the date on or by which a rate must be made) the councillors had acted honestly and reasonably, taken into account the advice proffered to them and acted in the interests of the ratepayers and/or in what they had honestly and reasonably believed to be the interests of the ratepayers; (iii) he had been wrong to conclude that the councillors had acted unlawfully or wrongly, or that they had done so deliberately or with reckless indifference to the results; (iv) he had been wrong to conclude that the councillors had not believed and that they had not reasonably believed, that the efforts of themselves and the council officers and others to attempt to negotiate with the Secretary of State and others would or might produce an improvement in the financial situation before making a rate; and he had been wrong to conclude (implicitly) that the councillors had not believed, and that they had not

reasonably believed, that it had been in the interests of the ratepayers to attempt to negotiate with the Secretary of State and others to improve the financial situation and to delay the making of a rate until such time as they had believed that no or no further improvement would be forthcoming; (e) he had been wrong to substitute his judgment (made with hindsight) of the likely outcome of efforts to negotiate with the Secretary of State and others to improve the financial situation for the judgment of the councillors made during the period up to 20 June 1985; the councillors' political judgment of the actual and likely attitude of the Secretary of State had been a matter for them and they had been entitled to believe, and had had good grounds for believing honestly and reasonably (and had so believed), that the public statements of the Secretary of State did not necessarily reflect the real position then or in the future; (f) the auditor had been wrong in dealing with the question of whether the councillors had committed wilful misconduct by delaying making a rate whilst attempting to negotiate with the Secretary of State and others to improve the financial situation first: (i) by imposing the requirement that the councillors should have had a "reasonable expectation" of improvement in the financial situation as a ground for delaying the rate, the councillors' contention being that a realistic hope had been sufficient if honestly held after reasonable inquiry (as had been the case); (ii) by accepting at face value the public posture of the Secretary of State and giving no or no sufficient weight to the political judgment of the councillors as to their "expectations" or hopes of an improvement in the financial situation by continuing attempts to negotiate; (g) the auditor had been wrong to disregard as irrelevant the councillors' expectation that the Department of Health and Social Security payments would not be withheld since such an expectation reasonably and honestly held would have negated the allegation of wilful misconduct; (h) he had been wrong not to conclude that the councillors' expectation that the Department of Health and Social Security payments would not be withheld had been honestly and reasonably held and that the councillors had been entitled so to expect; (i) he had been wrong to reject the councillors' contention that the timing of the making of a rate should not be dictated by the unilateral decisions of government departments to withhold moneys that, on any basis, had been payable to the council; (j) he had been wrong to reject the "Representations on behalf of certain members of Liverpool City Council" in response to his notice to the councillors of 26 June 1985; in particular, he had been wrong not to accept the bona fides of the councillors in those "Representations"; (k) he had been wrong in his "Statement of reasons for the decision of the district auditor to issue a certificate dated 6 September 1985 . . ." to impugn, in effect, the bona fides of the councillors, he having given no prior notice (by way of notice of 26 June or otherwise) expressly or by implication that that had been the case against the councillors; the councillors had thus been effectively denied the opportunity to make representations to the auditor as to their good faith in delaying the making of a rate prior to his decision to issue a certificate; the councillors in making their "Representations" had justifiably considered that the case against them had been that they

could not have believed that their efforts to improve the financial situation whilst delaying making the rate were likely to be fruitful or sufficiently fruitful to justify the delay, whereas the case made in the auditor's "Reasons" had been, inter alia, that they *had not* so believed; (l) he had not been validly appointed to hold the extraordinary audit; (m) he had not been carrying out the audit of any accounts or the extraordinary audit when he had purported to issue the certificate; (n) he had had no power to and had been wrong to issue the certificate; (o) the procedure adopted by him had been unfair; (p) he had been wrong to issue a certificate when he had failed to give adequate particulars of the charge of wilful misconduct; (q) he had been wrong not to see or hear the councillors before reaching a decision to issue a certificate; (r) he had been wrong to consider only two aspects of the accounts; (s) he had misdirected himself as to the proper application of section 2 of the General Rate Act 1967 in concluding that a breach of duty by delay in making a rate arose regardless of whether there was a reasonable explanation for the delay.

On 5 March 1986 the Divisional Court (Glidewell L.J., Caulfield and Russell JJ.) (*sub nom. Smith v. Skinner*; *Gladden v. McMahon*, The Times, 6 March 1986; [1986] R.V.R. 45) dismissed the motions. 48 of the councillors lodged notice of appeal, one having died since the decision of the Divisional Court. One councillor died after notice of appeal had been lodged. The district auditor indicated that he did not intend to proceed against the estates of the deceased councillors. The grounds of appeal were:

A. Jurisdiction: (1) in law it was the duty of a person conducting an inquisitorial process capable of decisively affecting the rights of others to give proper notice to any person directly affected by it of any matter arising in the course of the inquiry and an opportunity to make representations on it, where appropriate in person; the district auditor's certificate had been issued in breach of that duty and the Divisional Court ought without more to have quashed it; (2) the auditor had failed to act fairly towards each of the councillors in coming to his decision; he had made a series of findings adverse to them and integral to his decision to issue a certificate when (a) he had given them no notice that those matters were to be or might be considered by him; (b) they had been matters that had called in question the good faith of the councillors' acts as councillors and the veracity of their representations to the auditor; (3) Glidewell L.J. had erred in explaining the new matters as merely the non-acceptance of the councillors' own contentions; in particular, (a) they had included a fresh charge, not put at any stage to the councillors, that their motives for deferral of the rate could be deduced from the allegedly unlawful character of the rate once made and the alleged reluctance of certain of the councillors to allow a report of the city solicitor to be circulated to other councillors; (b) they had included findings that the councillors were lying to him about their motives; the first of those had required full notice and a chance to respond; the second had been such as to require the auditor to give each councillor the opportunity to be seen and heard by him in person before he came to any conclusion thereon; (4) the different approach taken by

A Caulfield J., namely, to ask whether there had been anything further that the councillors could have put forward to the auditor that would have been capable of affecting his determination, had been erroneous in law; it had also been erroneous in fact; (5) the findings of Russell J. that (a) the question of an oral hearing had been simply a matter for the auditor's discretion, and (b) there was "no merit" in the allegation that new material had been introduced without a further opportunity to B reply, had been erroneous, the first in law, the second in fact; (6) if, contrary to the foregoing, the auditor's certificate had had sufficient validity to found an appeal to the High Court, such appeal could only competently have proceeded on the issues and grounds and evidence lawfully entertained by the auditor; the Divisional Court had wrongly admitted evidence concerning the legality of the rate and based part of C its own decision on it.

B. Wilful Misconduct: (7) section 2 of the General Rate Act 1967 conferred a discretion as to the date of setting a rate; such discretion fell to be exercised on broad and ordinary principles of law, viz.: provided the councillors had had tenable *Wednesbury* grounds for deferral and had not deferred rate-making to a date that conflicted with other statutory requirements, their exercise of discretion had been lawful; the D multiplicity of conflicting demands on a local authority was a centrally relevant factor in determining the breadth of its discretion; (8) the Divisional Court had failed so to construe the legislation; instead they had erroneously limited the powers and discretions of local authorities with regard to rate-making so as to reduce or minimise the weight and relevance of such factors as critical urban decline and deprivation and E the performance of statutory functions for the benefit of the people of the area and so as to make the decisions and policies of central government determinative of or improperly influential on the exercise of local authorities' powers; (9) if the lawfulness of the rate had been properly before the Divisional Court the court's formulation of the need for a close approach to certainty in budgeting: (a) had been unwarranted by law, alternatively, if right, (b) underscored the need for a wide F discretion as to the timing; (10) on the evidence the councillors had not been guilty of wilful misconduct (a) because the relevant acts of their council had been intra vires, alternatively (b) because if the acts and omissions for which they had been responsible had been ultra vires, they had nevertheless believed them to be lawful; (c) because on the basis of advice given to them they had had a reasonable belief that the deadline G for setting a rate was 20 June; (11) the Divisional Court had failed sufficiently to distinguish between the acts of the council and those of the councillors; in particular, Glidewell L.J. had held (a) that since a council could only express itself by resolution, the want of a resolution setting out a particular intent meant that the council had had none; and (b) that the councillors likewise had expressed no intent; but (c) that if it had been that deferral might cause the Secretary of State to produce H additional funds it had been irrational; in fact, the evidence had made it plain that the councillors as individual councillors had tenably hoped for additional funds and had based their acts as voting councillors on that hope; Glidewell L.J.'s dismissal of the hope as "irrational" was not an

appropriate test of wilful misconduct, which remained that propounded by Webster J. in *Graham v. Teesdale* (1981) 81 L.G.R. 117 and required proof to a high standard that each councillor had known that or had been reckless as to whether he or she was doing wrong, i.e. voting for an unlawful measure; such knowledge, actual or constructive, was not supplied by a finding that it had been irrational to hold the material belief or hope.

C. Loss or deficiency: (12) on the uncontested evidence, the temporary loss of income (reflected in the notional interest surcharged) had been brought about by the voluntary act of central government, undertaken as a discretionary political counter-measure to the decisions of local authorities to defer making a rate; it had not been caused in the appropriately proximate sense by the councillors.

Louis Blom-Cooper Q.C., Beverley Lang and *Heather Williams* for the appellant councillors.

Anthony Hidden Q.C. and *Mark Lowe* for the district auditor.

Charles Cross for the council.

Cur. adv. vult.

31 July. The following judgments were handed down.

Lawton L.J. This is an appeal by 47 councillors of Liverpool City Council, all being members of the majority party on that council, against the judgment of the Divisional Court (Glidewell L.J., Caulfield and Russell JJ.) whereby it was adjudged that a certificate dated 6 September 1985, issued by the district auditor pursuant to section 20(1) of the Local Government Finance Act 1982, should take effect in law.

The issues

The appeal raises three issues. First, did the district auditor act fairly in issuing the certificate? Secondly, if he did not, did the appellants' appeal to the Divisional Court cure any unfairness? Thirdly, if any unfairness was cured, did the facts prove that the appellants, and each of them, had been guilty of wilful misconduct.

The background to the appeal

Ever since 1979 the central government has wanted to curb local government expenditure. Parliament has passed three Acts which has enabled it to take action towards this end, the Local Government, Planning and Land Act 1980, the Local Government Finance Act 1982 and the Rates Act 1984. The way in which these Acts work is set out in the judgment of Glidewell L.J. *sub nom. Smith v. Skinner; Gladden v. McMahon* [1986] 26 R.V.R. 45, 48 and need not be repeated in this judgment.

The central government's policy of curbing local government expenditure has been opposed by many councillors all over the country,

A and in particular it has been opposed by the majority of the councillors on the Liverpool City Council. The main grounds of opposition have been that the central government was encroaching on the independence of local authorities and that it was preventing them from meeting what they considered to be the needs of their areas. The appellants were, of course, entitled to take such steps as they wished in order to persuade the central government to change its policy. What they were not entitled B to do was to allow their political efforts in this respect to interfere with or impede the performance of their statutory duties, which included a duty to make a rate without unreasonable delay. The district auditor alleges that for the financial year beginning 1 April 1985, they unlawfully delayed making a rate, with the result that they had, by their wilful misconduct in that respect, caused the city council to incur a loss of C £106,103.

In the years before 1984 the city council had normally made a rate at the end of March or the beginning of April so that rate demands could go out in April. Delays in making rates are likely to cause loss to local authorities. There may be cash flow problems and a need to borrow money on the short term money market.

In the spring of 1984 the majority on the city council were of the D opinion that the central government, under the spending curbs imposed by the three Acts to which I have referred, had deprived Liverpool of large sums and that the rates ought not to be increased to cover the shortfall. On 26 March 1984, the Performance Review and Financial Control Subcommittee (which was the subcommittee primarily concerned with rate making), under the chairmanship of the appellant, Councillor E Byrne, proposed that for the rating year starting on 1 April 1984 there should only be a rate increase of 9 per cent. notwithstanding that such an increase would not provide for the estimated total expenditure which would be incurred during the coming rating year. A lawful rate would have to provide for such expenditure and it was the duty of the councillors to see that such a rate was made: see section 2 of the General Rate Act 1967, as amended. The chief executive, the city F solicitor and the city treasurer advised this subcommittee that this proposal, if implemented, would produce an unlawful rate. That advice was minuted and ignored by the subcommittee, who sent the resolution forward to the city council. The city council considered it at a meeting held on 29 March 1984. It was again advised to the same effect as the subcommittee had been. Once again the advice was minuted and G ignored. The resolution was passed. It was not put into effect because on 13 April 1984 negotiations started between the city council and the Secretary of State for the Environment with the object of getting more central funds made available to cover the shortfall in the rates. The city council did get more money from the central government and was able to make a lawful rate on 11 July 1984. The minutes and the reports circulated to all the members of the city council between March 1984 H and 11 July 1984 show that they were told in clear terms that if they delayed making a lawful rate or made an unlawful one they would not be performing their statutory duty and would be likely to cause a loss to the city council which might lead to their being surcharged for wilful

misconduct. The inference to be drawn from what happened in the summer of 1984—and it is a strong one—is that the majority on the council were using the rate making process to threaten the central government with financial chaos in Liverpool if the shortfall on the rates was not made good from central funds. The delay in making a rate in 1984 almost certainly caused some loss to the city council, but the then district auditor took no action against anyone under section 20(1) of the Act of 1982.

The history of the making of a rate for the financial year beginning 1 April 1984 is of importance in this case for three reasons. First, the appellants' case has been that the city council's success in 1984 in persuading the Secretary of State to make more money available from central government funds led them to think that they could repeat that success for the financial year beginning 1 April 1985. The needs which the Secretary of State in 1984 had recognised as needing alleviation still had to be met in 1985. Secondly, the district auditor's omission to take any action over the delay in making a rate in 1984 led them to think, at least until 16 April 1985, that the making of a rate could be delayed, and after 16 April that it could be delayed until 20 June. 16 April is an important date because on that day Woolf J. delivered a judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182. It got considerable publicity. It seems to me likely that many members of the city council would, about this date, have learnt something of what had been decided. The fact that judgment was going to be given on 16 April 1985 was reported to the Performance Review and Financial Control Subcommittee by the city solicitor on that very day. Woolf J. adjudged that for a local authority not to make a rate by the beginning of the rating year had obvious disadvantages of a financial nature which increased as the time went by. The members of the city council had been told this by the city solicitor in 1984. The law, however, said Woolf J., did not specify by what date a rate had to be made. He went on, at p. 184:

> "No generally applicable period can be laid down as to by when the rate must in any event be made so that an authority can be said to be in breach of its duty by that date. The facts of each case must be examined. However, in the absence of a reasonable explanation, not to make a rate by the beginning of a financial year or within a reasonable time thereafter—I have in mind weeks rather than months—would prima facie be unreasonable and, therefore, in breach of duty."

The making of the 1985–86 rate

In November 1984 the district auditor perceived that the city council was likely to have difficulty in making a lawful rate for 1985–86 because the Performance Review and Financial Review Control Subcommittee had forecast that by 31 March 1985 expenditure would exceed the budget provision and a substantial deficiency would arise. He issued a report to the city council pursuant to section 15(3) of the Act of 1982. It contained the following warning:

A "It is opportune for me to remind the council that they have a duty to levy a rate sufficient to provide for their estimated total expenditure to be incurred during the period covered by the rate together with such amount as is sufficient to cover expenditure previously incurred. The council does not now have the benefit of being able to levy supplementary rates to restore any shortfall in the original rate levy and it is therefore important that budget predictions B are accurate and achievable, if a deficit which will affect the level of the subsequent year's rate is to be avoided . . . A number of opportunities to secure better value for money which may assist the council in the longer term have been identified in audit work during the current year. These have been discussed with your officers and will shortly be discussed with members. However, some four months C only of the current financial year remain in which the council can act to contain expenditure within the original budget. Unless a determined effort is made now to achieve the budget intentions for the current year it is clear that the rate making process in the coming year will commence with the council in a seriously disadvantaged position. They are asked to review as a matter of urgency their achievements against budget expectations and to take D corrective action."

Despite that warning not much seems to have been done before 16 April 1985. During the early months of 1985 financial reviews were carried out from time to time and the Education and Social Services Committees did prepare budgets. At council meetings when budget matters were E discussed the majority on the council seem to have had their thinking dominated by what they considered to have been the mandates upon which they had been elected. On occasions resolutions were proposed by members of the minority on the city council that progress should be made with the rate making procedure. These resolutions were always defeated. During the early part of 1985 the city council had been associated with a group of local authorities who were trying to put F political pressure on the central government to change its policy about local government expenditure and to make more money available from central funds for local needs. On 7 March 1985, acting in concert with other local authorities, the city council passed a resolution which was nothing more than a political manifesto expressed in intemperate language. Resolutions in the same kind of terms had been passed in 1984 and earlier in 1985. The first, fourth and fifth paragraphs of this G resolution were as follows:

"(i) This council re-endorses the policies on which the people of Liverpool elected the Labour Party to power viz. (a) to defend existing city council jobs and services; (b) to create additional jobs and improve services; (c) to build houses for rent; (d) to end the threat of privatisation of city council services; and (e) to refuse to H impose increases in rates, rents and charges to compensate for government cuts in grants.

"(iv) This council requires a budget of £265.4 million but, with a target of only £222.1 million—representing another £90 million

stolen from them in grant penalties, this council considers it will be impossible to make a rate. The council therefore calls upon the Secretary of State to: (a) remove the meaningless and arbitrary targets; (b) remove the deliberately punitive penalties; (c) establish realistic level of rate support grant—the minimum being that which was offered in 1979; and (d) establish a level of housing environmental and partnership allocations commensurate with the needs of Liverpool; and

"(v) In particular, this council demands the return of resources stolen by the Tory Government since 1979 viz. (a) £170 million in rate support grants; (b) £24 million from further education; (c) £69 million in housing subsidy; and (d) £96 million in the housing investment programme."

Those who voted for this resolution have only themselves to blame if it was construed as a threat to hold up rate making in order to put pressure on the central government.

On 16 April 1985 there was a meeting of the Performance Review and Financial Control Subcommittee. It had before it a joint report of the chief executive, city solicitor and city treasurer which set out what were the statutory duties of the city council in relation to rate making and what were likely to be the consequences of making a substantially insufficient rate or failing to make one. The subcommittee also had before it a budget report of the city treasurer and summaries of the committees' income and expenditure and the detailed summaries of the expenditure and income of the Education and Social Services Committees. Nothing effective was done at this meeting to carry the rate making procedure forward. Members of the minority party on the subcommittee moved a number of resolutions directed to the need to make progress with rate making. All were defeated, as was a resolution that all members of the city council should be sent a report by the city solicitor as to the significance for the city council of Woolf J.'s judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* which was expected to be delivered that day. No effective action towards rate making was taken between 16 April 1985 and 21 May 1985 when the district auditor who, on 1 May 1985 had succeeded his predecessor as district auditor, wrote to all the members of the city council drawing their attention to the serious consequences to them which would follow "from the continued delay in making a rate sufficient for the council's requirements for the current financial year ending 31 March 1986." He suggested that a rate had to be made before the end of May 1985. This letter had effect. Committees did produce budgets before the end of May 1985. No committee met to consider what rate would be necessary to provide for the city council's requirements. There were, however, informal discussions between the city treasurer and the chairman of the Performance Review and Financial Control Subcommittee as to what the rate should be. At a special meeting of the city council held on 14 June 1985 it was resolved that the rate should be increased by 9 per cent. This increase did not begin to be sufficient for the city council's requirements. The estimated expenditure for 1985–86 was £265 million.

A deficit of £5.938 million had to be brought forward, making a total estimated expenditure of £270.938 million. With an increase of 9 per cent. the total rate was estimated to bring in £125.031 million which, after adjustments, left a shortfall of £117 million. This was clearly an unlawful rate. No explanation has ever been given as to why an increase of 9 per cent. was agreed upon.

The intervention of the district auditor

The rate-making activities of the city council were much publicised. The Audit Commission, pursuant to section 22 of the Act of 1982, directed the district auditor to hold an extraordinary audit of the city council's accounts for the financial year commencing on 1 April 1985 insofar as they related to the failure to make a rate or the delay in the making of a rate for that financial year. As a result of what he found out when carrying out the audit it seemed to him that a loss to the city council might have been caused by the wilful misconduct of those members of the majority on the city council who, between January and June 1985, had voted for a number of resolutions before the city council which had held up rate making during 1985. Not all members of the majority party had so voted. He decided to exercise his powers under section 20(1) of the Act of 1982 in order to recoup this loss from those who had caused it. He sent each member of the city council whom he suspected of causing a loss a notice dated 26 June 1985, the relevant parts of which are as follows:

> "Notice is given that at the extraordinary audit of the accounts of the Liverpool City Council for the year commencing 1 April 1985 I have to consider in pursuance of my duty under section 20(1) of the Local Government Finance Act 1982 whether I should certify the sum of £106,103, or any other sum, consequent on the failure to make a rate or the delay in the making of the same for that financial year as due from you on the ground that a loss of such sum has been incurred or deficiency caused by your wilful misconduct. Notice is also given that you may make representations in writing to me before I reach a decision. Any such representations must reach me by no later than 19 July 1985. I enclose a note of the matters to which I have had regard in deciding to issue this notice."

The accompanying note set out what he was alleging, namely, that by delaying the making of a rate without lawful justification each of the recipients of the notice had acted in breach of statutory duty and that the breaches had caused two readily assessable losses which he identified in an appendix. He also identified the documents, mostly minutes and reports, which he thought revealed the breaches of statutory duty.

The recipients of the notice decided that they would put before the district auditor a joint answer to the allegations made against them. This they did. There were advantages for them in putting forward a joint answer. It could be carefully drafted and there would be no danger of individuals contradicting one another. The answer was contained in a typed document on foolscap paper consisting of 29 pages, together with a number of appendices. One of them set out the text of a letter dated

29 June 1984 which the Secretary of State had written to the leader of the city council. The last paragraph of it was as follows:

> "Against that background, and bearing in mind the constraints set out in the two preceding paragraphs of this letter, I can give you an assurance that I will do my very best to ensure that allocations to Liverpool next year under the Housing Investment Programme and the Urban Programme, taken together, will enable the council to make positive progress in dealing with the city's severe needs, having regard to the scale of your capital commitments and the resources (including possible proceeds of sales of council dwellings and freeholds) available to you."

No request was made to the district auditor for him to hear any of the appellants or for them to be legally represented.

On 6 September 1985 the district auditor made a report to the city council pursuant to his duties under section 15(3) of the Act of 1982. He stated that he had considered the representation which he had received and had concluded that he had a duty under section 20 to certify that a sum of £106,103 was due from 49 members of the city council jointly and severally, being the amount of a loss incurred or deficiency caused by their wilful misconduct. Of the 49 members so certified, two have since died, leaving 47 appellants before this court. The district auditor's way of exercising his powers under section 20 was said by the appellants to be unfair. Whether it was so necessitates this court considering what are the powers, duties and practices of district auditors.

The powers, duties and practices of district auditors

The office of district auditor was created by the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101). Before then the justices, either in petty or quarter sessions, had dealt with problems relating to the collection and administration of the poor rate. The district auditor was given powers to deal with illegality and misconduct in relation to the collection and administration of the poor rate and to "charge" persons in default. The Poor Law Audit Act 1848 (11 & 12 Vict. c. 91) specified what procedure the district auditor was to follow when exercising his "charging" jurisdiction. He was required, when he found possible cause to "surcharge" any person, to give him notice in writing of a right to attend to "show cause against" the making of a surcharge. After the hearing the district auditor was to determine the matter according to the "law and justice of the case:" see section 8. By the Public Health Act 1848 (11 & 12 Vict. c. 63) the district auditor's jurisdiction was extended to the supervision of rates collected under that Act; but in it there was no provision similar to section 8. Between 1848 and 1929, when by the Local Government Act of that year great changes were made in the scheme for poor relief, the district auditor exercised in parallel two jurisdictions over rate making. In respect of one, the poor rate, he had been under a statutory obligation to offer oral hearings to those whom he was minded to surcharge; in respect of other rates he was not under any such obligation. The Poor Law Audit Act 1848 had been repealed by the Poor Law Act 1927; but section 8 of the Act of 1848 had been

replaced by section 153 of the Poor Law Act 1927. In practice district auditors seem to have offered all suspects an oral hearing, whatever the nature of the rate: see *Carson Roberts, Audit Law and Audit Work* (1919), p. 112:

> "The principle laid down in section 8 of the Poor Law Audit Act 1848 is one which should be observed most punctiliously in every case where the auditor has to make any decision which involves the purse or character of any person who is not present at the audit. This principle should be followed in all cases and not only in poor law audits (Memo of 1909 para. 75)."

The Local Government Act 1933 amended the Local Government Act 1929 and contained detailed provisions relating to the powers and duties of district auditors. The 19th century concept that an audit was a public proceeding which any local government elector could attend still continued: see section 226(1). Such an elector could object to the accounts before the district auditor. It is clear from the enabling section 226(1) that he was entitled to be present or to be represented. Section 228, which dealt with surcharging any person "by whose negligence or misconduct" the loss had been incurred or a deficiency had been caused contained no procedural directions as to how the district auditor was to discharge his duty; but it seems to have been accepted that he had to act judicially. In order to do so in practice district auditors offered oral hearings: see *Hurle-Hobbs, The Law Relating to District Audit* (1949), p. 100, where there is a footnote in these terms: "In practice, district auditors invariably afford persons likely to be affected by their decisions an opportunity of being heard at audit." From the context and certain forms which he suggested could be used, it is clear that by "heard" he meant heard orally.

The Local Government Act 1933 was repealed by the Local Government Act 1972 which came into force on 1 January 1974. It made some changes in relation to the law governing the powers and duties of district auditors. Those relating to objectors were substantial; but they continued to have a right to attend before the district auditor: see section 159. The power to surcharge was limited to a loss incurred or deficiency caused by "wilful" misconduct. Save for this change and the abandonment of the concept that audits were public proceedings, the Act of 1972 followed the provisions of the Act of 1933. *Jones, Local Government Audit Law* (1981) states, at pp. 277–278:

> "It would seem in principle that in order to give a person the fullest rights to answer a case against him it is necessary to hold an oral hearing so that witnesses may be seen and questioned. . . . However, some statutory tribunals have power to dispense with oral hearings and in other instances where matters have required judicial consideration it has been held that it is not contrary to justice to determine them on written communications only. . . . District audit practice has generally been to hold oral hearings. . . . But if all parties are agreeable to a matter being decided on the basis of written representations possibly after initial attendance by an objector . . . it seems, on the basis of the precedents cited above,

that this may be admissible, provided that all parties are given a fair opportunity to comment on statements adverse to them."

Between January 1974 and 1980, 14 certificates were issued by district auditors for wilful misconduct surcharges. In all but one of these cases an oral hearing was offered and in 11 of them the offer was accepted. All these cases, however, involved only one person. The case in which no oral hearing was offered related to a man who had been convicted and sent to prison for what was alleged to be his wilful misconduct. The history of the office and practices of district auditors establishes that certainly from about 1909 at least until 1982 it was the normal, perhaps invariable, practice for district auditors to offer oral hearings. The reported cases relating to surcharging, starting with *Reg. v. Roberts, Ex parte Scurr* [1924] 2 K.B. 695 and ending with *Asher v. Lacey* [1973] 1 W.L.R. 1412, all reveal that before issuing his certificate the district auditor gave the suspect an oral hearing.

The Local Government Act 1982 repealed the provisions of the Act of 1972 which dealt with the powers of district auditors. By section 11 an Audit Commission was established which was to be responsible for auditing the accounts of a large number of public bodies, including those of local authorities. The district auditor is an officer of the Audit Commission and is generally referred to as a district auditor. The Audit Commission is not an organ of the central government, nor are its officers servants of that government. By section 14 a code of practice was to be prepared and presented to Parliament for approval. This was done. As in the Acts of 1933 and 1972, the Act of 1982 envisaged that an objector to any accounts could appear before the district auditor (see section 17) and the Code of Practice envisaged too that any person adversely affected by an objection should be offered an oral hearing: see paragraphs 17 and 18. As in the Acts of 1933 and 1972, the Act of 1982 made no statutory provision for anyone suspected of wilful misconduct to be offered an oral hearing.

Fairness

When exercising his powers under section 20 of the Act of 1982 the district auditor had a constitutional duty to act fairly towards each of the appellants. There has been no dispute about that in this case. What did he have to do in order to act fairly? Mr. Blom-Cooper, on behalf of the appellants, submitted that when he sent out the notices dated 26 June 1985 he should have afforded each recipient an opportunity of an oral hearing and that his failure to do so was such a grave affront to fairness (I avoid using the words "natural justice") that his certificate ought not to be enforced. Alternatively, Mr. Blom-Cooper submitted that even if it was permissible for the district auditor to start by inviting written representations, when he received them and appreciated that the appellants were giving explanations on matters which he thought pointed towards wilful misconduct, and above all when he learned that they were denying that they had done anything which could be reasonably adjudged to be wilful misconduct, he should then have given them, and each of them, an opportunity of an oral hearing or, at the very least, an

A opportunity of having their cases presented by a lawyer. They were entitled, he submitted, to have a fair opportunity to comment on statements in the district auditor's reasons, given on 6 September 1985, which were adverse to them.

Mr. Blom-Cooper's first submission of fairness was not put to the Divisional Court. Counsel then appearing had made his submissions in the alternative way in which Mr. Blom-Cooper has made his in this B court. It seems that he did not know of the history of the office of district auditors which Mr. Blom-Cooper's research has revealed. It was on this history that Mr. Blom-Cooper based his first submission. His argument was that Parliament in 1933, 1972 and 1982 should be deemed to have known how district auditors in practice exercised their powers by always offering oral hearings. We should infer that Parliament C intended that the practice should continue as an essential feature of district auditors' jurisdiction under section 20 of the Act of 1982. This reasoning can be turned upon itself. Between 1848 and 1929, probably for historical reasons going back to the days when justices sat in sessions, Parliament provided in relation to the poor rate that suspects should be given an opportunity of an oral hearing. It made no such provision in relation to other rates. I would infer from this legislative D history that in the subsequent Acts Parliament left it to the discretion of district auditors what procedure to adopt when exercising their powers to surcharge. In exercising their powers they had to do so fairly, honestly and to the best of their ability: see *Bushell v. Secretary of State for the Environment* [1981] A.C. 75, 94–95, *per* Lord Diplock.

In my judgment, on the facts of this case, the district auditor should E not be criticised for the way he started his inquiry. It was likely to be complex. If he offered oral hearings at the outset and before he knew what kind of answers each of the appellants was going to make, his inquiry might take an inordinate time. Time did matter. If the appellants, or some of them, had been guilty of wilful misconduct, the sooner they were disqualified from holding public office the better; but if they had not been so guilty, the threat of disqualification should be removed F without delay. Further, by inviting written representations the district auditor might have been able to discover quickly whether any of the appellants had a satisfactory answer or none at all. An appellant, for example, who claimed that making a rate was contrary to some political theory he believed in would have had no answer; it would have been a waste of his and the district auditor's time to give him an opportunity of G explaining his answer in person. I infer from the facts of this case that the appellants themselves were content with the procedure adopted by the district auditor. As I have already commented, it had some advantages for them. Amongst the appellants there were two magistrates and a solicitor who would, I feel sure, have protested had they thought that there was anything unfair in not being offered oral hearings at the outset. I do not accept the first part of Mr. Blom-Cooper's submission.

H In order to deal with his alternative submission it is necessary to consider some of the reasons which the district auditor gave for his decision. In their joint answer the appellants made three basic averments: first, that they had acted in good faith and in the interests of the citizens

and ratepayers of Liverpool; secondly, that until 6 June 1985 they had believed that the central government would make funds available to them which would enable them to make a lawful rate; and thirdly, that this belief justified them in delaying making a rate until 20 June 1985 at the latest. The district auditor's findings on these averments were first, that they had not acted in good faith—they had followed "a course of conduct aimed at conducting a political battle without regard for statutory and other obligations and duties" (see paragraphs 55, 78 and 90 of his reasons); and secondly, that the reasons advanced to support the delay in commencing the budget-making process were not the real reasons for the delay (see paragraph 92). The district auditor was in effect saying that he did not believe their explanations. They were contrived excuses which hid the reality. He queried their credibility and honesty and found them wanting.

Mr. Hidden, on behalf of the district auditor, submitted that this followed inevitably from the facts which were set out in the city council's own minutes and documents. What the appellants were saying was wholly inconsistent with what was in these minutes and documents. An example is provided by their assertion that they had acted "in good faith and after taking advice from their officers." They had not acted on the advice of their officers in March 1984, and again in April 1985 and on 14 June 1985. Their assertion that they believed until 6 June 1985 that the central government would provide further money was so contrary to the facts that no rational person could have believed anything of the kind. The evidence relied on by the district auditor for rejecting the appellants' assertion that they believed that more money would be forthcoming was strong; but it is a matter of human experience that political zealots, as some of the appellants seem to have been, can so delude themselves about reality that lying is unnecessary for them. The courts are chary, however, about disbelieving people and attributing bad faith to them without an oral hearing: see *In re Smith and Fawcett Ltd.* [1942] Ch. 304, *per* Lord Greene M.R. at p. 308, and *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551, 568, *per* Viscount Dilhorne. Had the appellants been given an opportunity of commenting on the adverse opinion of their conduct which the district auditor had formed they, or some of them, might have been able to persuade him of their good faith and credibility. Maybe on the facts of this case they would have had difficulty in so doing; but, in my judgment, they should have been given a chance of doing so. It was unfair not to have given them that chance.

The consequences of the appeal to the Divisional Court

Two questions now have to be answered. First, was the appellants' appeal to the Divisional Court capable of curing the unfairness which I have identified in the district auditor's conduct of the section 20 inquiry? Secondly, if it was, on the facts of this case did it?

The first of these questions raises a point of law which has been considered both in this country and in the Commonwealth and has engendered much academic comment: see *Wade, Administrative Law*, 5th ed. (1982), pp. 487–489, and *de Smith's Judicial Review of*

Administrative Action, 4th ed. (1980), pp. 240–246. There are two broad lines of authority bearing on the question whether unfairness at first instance can be cured by an appeal. I do not propose to review them because, in my opinion, the starting point in any inquiry of this kind is to construe the statutory provisions which confer the originating and appellate jurisdictions with the object of finding out whether Parliament intended to provide a legal framework in which aggrieved persons could be assured of justice. As I have come to a firm conclusion about the effect of the statutory framework in this case there would be no point in my examining the statutory or contractual frameworks which have been considered in other cases.

The Act of 1982 is silent about the procedure to be followed by a district auditor when considering whether to surcharge anyone suspected of wilful misconduct. District auditors are required to have professional qualifications as accountants but not as lawyers. When exercising their powers under section 20(1) they may get both the law and the procedure wrong and take wrong-headed views of the facts. A mistake under any of these heads would be likely to give rise to a grievance. Parliament would have appreciated this. Hence the provision for appeals which is contained in section 20(3) of the Act of 1982. An appeal is available to any person "who is aggrieved" by a decision of an auditor and on the hearing of the appeal "the court may confirm, vary or quash the decision and give any certificate which the auditor could have given." This must mean that the court rehears the case. There are no limitations on what the aggrieved person can complain about. In this case the appellants wanted to complain, inter alia, about not having been afforded any opportunity for an oral hearing. There was nothing in section 20(3) to stop them doing so; and they did. In my judgment the statutory framework of section 20 reveals an intention on the part of Parliament that all complaints, whatever their nature, against the decision of a district auditor, should be brought before the court so that at the end of the appellate process justice can be done. It would not have been right, as was submitted by counsel for the district auditor before the Divisional Court, for the appellants, because of the alleged unfairness, to have applied for judicial review, instead of appealing. Glidewell L.J. was of the opinion that in principle they should have done so, but considered that he was bound by the decision of this court in *Asher v. Secretary of State for the Environment* [1974] Ch. 208. He was so bound and so are we. It is, however, my opinion that that case was rightly decided. In this court Mr. Hidden reserved the point. In my judgment the Divisional Court was capable of curing such unfairness as there was in the way the district auditor exercised his powers.

Did the appeal cure the unfairness?

As the amount of the certified loss exceeded the amount over which county courts have jurisdiction the appeal was to the High Court: see section 20(9) of the Act of 1982. It was heard by a Divisional Court. The procedure to be followed on an appeal under section 20(3) is set out in R.S.C., Ord. 98. Rule 4(2) of that Order is in these terms: "Except insofar as the court directs that the evidence on any such

application or appeal shall be given orally, it shall be given by affidavit." All the councillors filed affidavits: the leader of the city council, Councillor Hamilton, filed four; the chairman of the Performance Review and Financial Control Subcommittee, Councillor Byrne, filed three. Councillor Hamilton and Councillor Byrne put forward detailed explanations on comments and findings which were adverse to or critical of the appellants as a body or of themselves in particular. Some of the appellants who were chairmen of committees made detailed comments about matters of which they had personal knowledge. All deposed that they agreed with what Councillor Hamilton had sworn in his first affidavit. Before the Divisional Court all the appellants were represented by the same counsel, namely, Mr. Stephen Sedley, and Miss Beverley Lang. Mr. Sedley did not ask the court to direct that any evidence should be given orally. When the court itself asked counsel to consider whether there should be a direction for an oral hearing or for any deponent to be cross-examined, Mr. Sedley said that such a direction would not be appropriate. I am satisfied that the Divisional Court gave the appellants every opportunity of leading any evidence they wished and, through experienced counsel, of making all relevant submissions. The proceedings before that court were truly a rehearing and not, as Mr. Blom-Cooper suggested, a critical examination of a reasoned decision. In my judgment the appellants, and each of them, had a fair and adequate opportunity of dealing with any findings and comments which were critical of or adverse to them in the district auditor's written reasons dated 6 September 1985. Such unfairness as there was in the way he performed his duties was cured by the appeal.

Were the appellants, and each of them, guilty of wilful misconduct?

It is trite law that when a number of persons are charged with having combined together to commit an offence the jury or magistrates must consider the case of each defendant separately. The same principle applies in this case. The application of it, however, is not difficult because those of the appellants, who were not leaders, by their votes at council and committee meetings, supported the leaders and encouraged them to go on pursuing the course of conduct which is under scrutiny in this case. Further, when the time came for answering accusations of wilful misconduct they expressly stated that they adopted what the leader of the council, Councillor Hamilton, had said in his and their defence. On the facts of this case I can see no valid reason for distinguishing between any of the appellants.

For the purpose of considering whether the appellants were proved to have been guilty of wilful misconduct I shall not review the evidence in detail. The Divisional Court did so. Reference can be made to the judgments there.

I start by considering what constitutes "wilful misconduct" and by what standard of proof it should be established. Wilful misconduct is a more serious charge than "negligence or misconduct," which was the criterion under the Act of 1933. In *Graham v. Teesdale* (1981) 81 L.G.R. 117, Webster J. adjudged that for the purposes of section 161(4) of the Local Government Act 1972 (section 20 of the Act of 1982 is in

the same kind of context) wilful misconduct meant "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not:" see p. 123. I agree. As to the burden of proof, although a section 20 inquiry is not a criminal proceeding, nevertheless, following what Denning L.J. said in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247 it should take a lot of evidence to tip the balance in favour of a positive finding because the accusation is serious and the consequences of such a finding are grave.

The appellants were elected to the city council on a manifesto which pledged them to maintain and improve jobs and services and to refuse to impose increases in rates. The evidence establishes that they tried to do what they had pledged themselves to do; but what they wanted to do cost money, which could only be got from the ratepayers or central government. There was, however, an insuperable difficulty in their way. Parliament had given the central government powers to curb local government expenditure. This it could do by reducing grants from central funds. In 1984 the majority party on the city council had made clear to the Secretary of State that if he did not authorise the payment of more money from central funds they would make an unlawful rate which would have caused financial chaos in Liverpool and might have had repercussions elsewhere. The Secretary of State did make more money available and wrote the letter dated 29 June 1984 to which I have already referred. When, at the end of 1984, the time was approaching for the city council to start thinking about rate making for the financial year beginning 1 April 1985 the majority on the city council decided to repeat the tactics which had been successful in 1984. The letter dated 29 June 1984 gave some hope of another success. An essential move in these tactics was to delay making a rate. Nothing effective was done about making a rate before 16 April 1985. In my judgment the reason for this inactivity, about which all members of the city council had been warned by the district auditor, was the wish of the majority party to exert political pressure on the Secretary of State. By 16 April 1985, however, no rational member of the majority party (and I assume all the appellants are rational) could have believed that there was any hope of persuading the central government to make further grants out of central funds to Liverpool. In January 1985 Parliament had approved the rate support grant report and the associated proposals intended to deter excessive spending. In February 1985 the Secretary of State in strong terms had written to the leader of the city council telling him that no more money was going to be made available. More letters in similar terms were written in March 1985. On 14 March 1985, in a written answer to a Parliamentary question, the Secretary of State said:

> "I wish to make two things clear. First, there is no question of the Government reconsidering the rate limits or the present limits or the rate support grant settlement for 1985–86 all of which Parliament has approved. There will be no 'negotiations'. Second, while I am prepared to meet the local authority associations to discuss issues of general concern or to meet individual authorities where they have genuine local issues to raise with me, I see no purpose in a further meeting with the ad hoc and unrepresentative group led by

> Councillor Blunket . . . No rating authority can now have any excuse for delay in carrying out its duty to make a lawful rate. But if any authorities are still considering delay they should be clear about the consequences . . . Finally, I should remind all councillors that if a failure to make a rate leads to loss or deficiency and the auditor considers that this results from wilful misconduct, then those responsible may be surcharged."

There was a local issue in Liverpool about grants under the Urban Areas Act 1978 but the maximum amount which could have been obtained was so small that it would not have made much difference to the rate which would have to be levied in order to comply with section 2 of the General Rate Act 1967 as amended. After that Parliamentary answer, in my judgment, it is inconceivable that any of the appellants could genuinely have believed that the central government would willingly make more money available. What they did believe, so I infer, was that the Secretary of State would in the end have to make more money available in order to avoid the financial chaos in Liverpool which would result if a rate was not made or there was a long delay in making a rate. What happened on and after 16 April 1985 supports this inference. Despite Woolf J.'s judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] R.V.R. 182, the advice of the city's principal officers and the efforts of the minority party, inactivity in the rate making process continued until the district auditor, by his letter dated 21 May 1985, made clear to all the members of the city council that if they did not make a rate soon they were likely to be surcharged. Then and only then did the majority on the city council bestir themselves to prepare budgets. When a rate was made it was an unlawful one, which all the appellants must have appreciated it was. The district auditor did not charge the appellants with making an unlawful rate but the fact that they did reveals their thinking during the six weeks before 14 June 1985. Pursuit of their political objectives was not a valid excuse for not performing their statutory duty under the General Rate Act 1967. In my judgment there was ample evidence on which the Divisional Court could find wilful misconduct.

As a result of the delay in making a rate until 14 June 1985 the city council did not receive at the beginning of that financial year either the rate rebate element of the housing benefit subsidy or any contribution from the Treasury in lieu of rates on Crown property. These were the two items of loss identified by the district auditor. The Department of Health and Social Security warned the city council early in 1985, as they had done in 1984, that the rate rebates element of the housing benefit subsidy would not be paid until a rate had been made. The Treasury Valuer had done the same in respect of contributions in lieu of rates on Crown property. As a result of the delay in making a rate these sums were not paid when otherwise they would have been. In my judgment the delay caused the resulting losses. It is immaterial that the central government were under no legal obligation to make these payments.

I would dismiss the appeal.

A DILLON L.J. This court has, in my judgment, to consider three questions on this appeal, viz. (1) Was the procedure of the district auditor, before he issued the certificate of surcharge of 6 September 1985, fair to the councillors? (2) If no, was the unfairness cured by the hearing on appeal in the Divisional Court? and (3) if the answer to either of those questions is in the affirmative, was the decision of the Divisional Court correct on the merits of the appellants' appeal against B the district auditor's certificate?

I have qualified the third question in this way because if the procedure of the district auditor was unfair and the unfairness was *not* cured by the hearing in the Divisional Court, the appellants are entitled to succeed in this appeal and have the certificate of surcharge set aside without further inquiry into the merits.

C I do not need to set out the facts in this judgment since they are comprehensively set out in the judgment of Glidewell L.J. in the Divisional Court [1986] 26 R.V.R. 45, 58 et seq., and have been summarised by Lawton L.J. so far as necessary for the purposes of this appeal.

I turn to the first question.

D It is not suggested that the district auditor was biased or prejudiced against the appellants, or that he intended to treat them unfairly. What is said is that the procedure which he adopted, and required them to follow, was, even if inadvertently, fundamentally unfair to them, and unjust in the result, because he should, either at the outset, or after considering their collective representations of 19 July 1985 and before making his findings, have given the appellants the opportunity of an oral E hearing, or alternatively, at the lowest, he should, after considering their collective representations and before making his findings, have given them an opportunity to comment on the principal findings which he was minded to make. By one or other of these routes the district auditor should, it is said, have given the appellants a fair opportunity of correcting what he was minded to find against them, and of disabusing his mind of any misconceptions which he might have formed.

F Additionally or alternatively it is submitted that the procedure adopted by the district auditor lacked fairness, because in his statement of reasons which accompanied the notices of his certificate of 6 September 1985 he introduced new matters with which the appellants had had no opportunity of dealing.

It is not in doubt that in deciding, in the course of carrying out an G audit, whether or not a loss has been incurred by the wilful misconduct of any person, a district auditor is acting in a quasi-judicial capacity. He must, therefore, act fairly by that person or, as it used to be put, he must observe the requirements of natural justice. This has been established law for a very long time. It is equally well-established, however, that a person who has to decide a question in a quasi-judicial capacity can, in general, lay down his own procedure. Whether or not, H therefore, the district auditor ought ultimately to have offered the appellants an oral hearing on any ground, I can see no objection whatsoever to the course he adopted in the first place of inviting written representations from the appellants.

The district auditor put to the appellants the case they had to meet fairly and in sufficient detail, by reference to the minutes and reports listed in appendix 2, in his note which accompanied each of the notices to the appellants of 26 June 1985. He asked for their written representations. The result was that they produced for him a very carefully drawn and thorough document which served to clarify the issues considerably. I cannot think that fairness required the district auditor to launch out on an oral hearing involving no less than 49 councillors, against a very complicated background, without any previous request for written representations or attempt to define the issues.

It remains to consider whether, after he had received and considered the appellants' representations and before he made his findings, he should have offered the appellants an oral hearing, or at the least an opportunity of commenting on the findings he was minded to make. Our attention has been drawn to the observations of Hamilton L.J. in *Rex v. Local Government Board, Ex parte Arlidge* [1914] 1 K.B. 160, 191, that

> "the question whether the deciding officer 'hears' the appellant audibly addressing him or 'hears' him only through the medium of his written statements, is in a matter of this kind one of pure procedure."

Conversely there are, I apprehend, cases where a fair chance of exculpation cannot be given without the offer of an oral hearing: see the observations of Geoffrey Lane L.J. in *Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain* [1979] 1 W.L.R. 1401, 1407G.

Historically every person threatened with surcharge by a district auditor for negligence or misconduct has almost invariably been given, or offered, an oral hearing. This practice has no doubt arisen in part from the fact that the audits, in the course of which questions of surcharge arose, were, under the earlier statutes, required to be held in public: see, e.g. section 247 of the Public Health Act 1875 (38 & 39 Vict. c. 55). Also section 8 of the Poor Law Audit Act 1848 expressly required the district auditor, at poor law audits, to give notice to any person whom he saw cause to surcharge and to allow that person an oral hearing. But the practice has also, in my judgment, arisen from the recognition that the district auditor, in deciding on questions of negligence, misconduct and surcharge, is discharging a quasi-judicial function: see the successive books by Mr. Carson Roberts, Mr. Hurle-Hobbs and Mr. Reginald Jones on audit practice published by H.M. Stationery Office. Importance has been attached for over 75 years to the observations of Farwell L.J. in *Rex v. Roberts* [1908] 1 K.B. 407, 440, that

> "I fail to see how the auditor can discharge the duties put upon him . . . unless he hears and determines the questions of illegality, negligence and misconduct mentioned in the subsection in the only way consonant with the elementary principles of justice, viz., after hearing the evidence and the arguments of the parties."

Mr. Hidden submits that this deep-rooted practice has been swept away, sub silentio, by the changes in the law, and to some extent in

A procedure, embodied in the Local Government Act 1972, as compared with the Local Government Act 1933 and earlier Acts. For my part, I have difficulty in accepting this, since the function of the district auditor in these matters remains a quasi-judicial function since the Act of 1972 as it was before, and in one important respect the burden on him is now increased, in that it is now for the district auditor to decide whether the B misconduct of any person, referred to in section 20(1)(*b*) of the Act of 1982, was wilful. The information supplied to us indicates that it has continued to be the practice of district auditors since 1972 to offer an oral hearing to any person threatened with a surcharge for wilful misconduct. The present case of the Liverpool councillors, and the parallel case of the Lambeth councillors, are virtually the first cases where that practice has not been followed.

C Mr. Hidden submits alternatively that the practice of offering oral hearings to persons threatened with surcharge has rested on an unchallenged assumption since audits ceased being held in public and that the decision whether or not to offer an oral hearing is in truth a matter of pure procedure within the discretion of the district auditor.

He claims that there is no valid basis for challenging the way in D which the district auditor exercised his discretion in the present case, and he points out that none of the appellants ever asked for an oral hearing.

As to this, there are in my judgment, three factors to be taken together. One is the practice of district auditors referred to above—though again there is no evidence from the appellants that any of them felt deprived of a legitimate expectation when he or she was not offered E an oral hearing. The second is the seriousness of the surcharge to the individual appellants; it carries the penalty of disqualification from office for five years for people, many of whom have been active in local government in Liverpool for a long time, and it also carries a liability to pay an amount of £106,103 for which they are jointly and severally liable if the surcharge stands, which, though small compared with the annual F needs of the City of Liverpool, could spell bankruptcy and financial ruin for many of the appellants. The third factor, which to my mind points strongly in favour of the view that the district auditor ought to have offered an oral hearing before he gave his certificate, is that what the district auditor did in his statement of the reasons for his decision to issue the certificate, was to reject as untrue the explanation of their G conduct and motives which the appellants had put forward in their collective representations. He found in clear terms in paragraph 92 of his reasons that "the reasons adduced by members to support the delay in commencing the budget-making process are not the real reasons for the delay." A court of law could not, in my judgment, in the circumstances of this case, have reached that stark conclusion of fact on mere documentary evidence without according the appellants at least the H opportunity of an oral hearing: see *In re Smith and Fawcett Ltd.* [1942] Ch. 304, 308, *per* Lord Greene M.R.

A district auditor is, of course, not bound to follow all the procedures of a court of law; but the gravity of the finding which he proposes to

make on documents alone is a factor which calls for an oral hearing to be offered.

Because of these three factors, I am for my part inclined to the view that the district auditor ought, after he had considered the appellants' collective representations, to have offered them an oral hearing before he made his findings and issued his certificate. I find it unnecessary, however, to reach a final conclusion.

On the separate submission, to which I referred above, that the district auditor acted unfairly in that in his statement of reasons which accompanied the notices of his certificate of 6 September 1985 he introduced new matters with which the appellants had had no opportunity of dealing, I agree with Glidewell L.J. that there were no new matters: see [1986] 26 R.V.R. 45, 58. The point most strongly pressed as a new matter is that it is said that he found against the appellants that the rate for the year 1985–86, which by the appellants' votes the council set on 14 June 1985, was an illegal rate. I do not, however, read the statement of reasons as containing any such finding. The relevant paragraphs in the statement of reasons are paragraphs 9, 39, 40 and 61. The district auditor there records first that the rate made at the council meeting of 14 June 1985 was inadequate to meet the council's approved estimated expenditure for the year concerned and secondly that, before the resolution to make that rate was passed at the meeting of 14 June the city solicitor advised the council that if passed the resolution would be contrary to law. These are facts which appear from the minutes of the meeting of 14 June 1985, and those were among the minutes which the district auditor had listed in appendix 2 to his note which accompanied the notices to the appellants of 26 June 1985. The district auditor has used these facts as a test of the credibility of the appellants in the explanation of their motives put forward in their collective representations, and in particular he has contrasted the making of the rate despite the city solicitor's advice that it would be contrary to law with the assertion in paragraph 2 of the collective representations that in all these matters the appellants have throughout acted in good faith and after taking advice from their officers. But the district auditor has not found that the rate made on 14 June 1985 *was* illegal; it was not necessary for him to do so. I have already referred to the factor, as pointing in favour of an oral hearing, that the district auditor was in his findings rejecting the appellants' explanations as untruthful; I cannot see that the appellants make out the additional claim that the district auditor relied on new matter which they had not had a chance of dealing with.

Before I pass to the second of the three questions listed at the outset of this judgment, I should refer to a point taken by Caulfield J. in his judgment in the Divisional Court. Caulfield J. had said that the question which had troubled him most in the case was whether natural justice required the district auditor to do more than to invite, as he did, the appellants to put forward written representations. He concluded that no more was required of the district auditor because there was no matter of fact or comment or argument which could have been added to the written representations and which might have affected the auditor's determination. With every respect, I am unable to agree with this

conclusion. There were matters in my judgment which, if given a further opportunity, the appellants would have wanted to urge on the district auditor, such as their prospects, whatever they may have been in September 1985, of balancing the books despite the apparent shortcomings of the rate fixed on 14 June, and the facts as to the progress made at the beginning of April 1985 in determining the estimated income and expenditure for the year 1985–86 of the various committees and in particular of the Education Committee and the Social Services Committee. It may be that no further facts which were available to be put forward, and no amount of argument, would in the event have caused the district auditor to change his mind; but that is not relevant if there was unfairness by their not being given a chance of putting forward further representations, oral or written, and if that unfairness has not been cured by the appellate hearing in the Divisional Court.

I turn, therefore, to consider the effect, on the assumption that there was such unfairness, of the appellate hearing in the Divisional Court.

The appeal is provided for by statute in section 20(3) of the Act of 1982, and the Divisional Court is given very wide power to confirm, vary or quash the decision of the district auditor and to give any certificate which he could have given. I agree entirely with the Divisional Court that the appeal hearing before the Divisional Court required an examination de novo of the questions which the district auditor had to consider and the appeal fell to be decided on the evidence and arguments placed before the Divisional Court, whether or not they had been placed before the district auditor. In that sense the Divisional Court was exercising an original as well as an appellate jurisdiction. Moreover any challenge to the fairness of the district auditor's decision on grounds of natural justice was within the scope of the appeal; this is clear from the decision of this court in *Asher v. Secretary of State for the Environment* [1974] Ch. 208, which is binding on us, and especially from the observations of Lawton L.J. at p. 228 with which I respectfully agree.

It follows, incidentally—though it is not relevant to the disposal of this appeal—that with all deference to Glidewell L.J. I do not agree that a challenge to the fairness of a district auditor's procedure ought to be made by an application for judicial review rather than by an appeal to the Divisional Court. The procedure of an appeal is laid down by statute as the procedure for challenging a certificate of a district auditor, and questions of the validity of a district auditor's decision on procedural grounds should also be taken on such an appeal and not by other procedure. The "decision" of the district auditor referred to in section 20(3) of the Act of 1982 must mean his "conclusion", which is susceptible of an appeal under the section, even if reached in breach of natural justice and therefore for certain purposes void: see the observations of Lord Wilberforce in *Calvin v. Carr* [1980] A.C. 574, 590F–G, and of Viscount Simon in *White v. Kuzych* [1951] A.C. 585, 600.

The question whether a decision vitiated by a breach of the rules of natural justice—i.e., by unfairness, e.g. by failure to allow a person an opportunity to be heard—can be cured or made good by a subsequent hearing has been considered in a number of cases recently. It is plain that no clear and absolute rule can be laid down: see *per* Lord

Wilberforce in *Calvin v. Carr* [1980] A.C. 574, 592C–D, and *per* Barwick C.J. in *Twist v. Randwick Municipal Council* (1976) 12 A.L.R. 379, 384. If the scope of any permissible appeal is limited, so that it does not involve an examination of the circumstances of the case de novo on evidence not limited to that which was before the original tribunal, it may well be that the appellate hearing will not cure the defects of the original decision.

Where, however, as here, the appeal does require an examination of the circumstances of the case de novo on whatever evidence may be put before the appellate court, then the major question for consideration is, I apprehend, whether, in the context of this particular case, the procedure as a whole gave the appellants an opportunity for a fair hearing.

As to that, the appellants' objections to the procedure of the district auditor are that they did not have an opportunity of an oral hearing and did not have an opportunity of dealing with the district auditor's proposed findings. But on the appeal they were able to put in, and did put in, as much evidence as they wished to deal with those findings and to answer every point taken against them by the district auditor, and they were given, though they did not take advantage of it, the opportunity of giving oral evidence. Their complaint on the ground of overall fairness therefore comes down to this, that to appeal after an order has been made is much less advantageous than an opportunity to advance reasons against the making of the order before it has been made. That as a fundamental ground of complaint on the score of fairness was rejected by the High Court of Australia in *Twist's* case, 12 A.L.R. 379; it could really only stand as a fundamental ground of complaint if, contrary to *Calvin v. Carr* [1980] A.C. 574, the observations of Megarry J. in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34, 48F, 49D, were to be treated as validly laying down a rule of general application that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.

In *Twist's* case, 12 A.L.R. 379, 387, Mason J. attached importance to the factor that, in certain Privy Council and Canadian cases, the party affected had elected to treat the decision of an administrative body as a valid, though erroneous, decision, by appealing from it in preference to asserting his right to a proper performance by the authority of its duty at first instance. That factor is not relevant in the present case, since in my view, as explained above, the appellants were bound to appeal against the decision of the district auditor if they wanted to challenge that decision. But the absence of that factor does not preclude the application to the present case of the reasoning of the members of the court in *Twist's* case, which was said in *Calvin v. Carr* [1980] A.C. 574 to be close to the views of their Lordships in the latter case.

The general principle is formulated in *Calvin v. Carr* [1980] A.C. 574, 594F–G as being that what is required is examination of the hearing process original and appeal as a whole, and a decision whether after it has been gone through the complainant has had a fair deal of the kind that he bargained for. *Twist's* case is of particular relevance to the present case in that the procedure was laid down by statute, rather than

by contract or by the rules of a domestic body or trade union, and in that the appeal prescribed by that procedure was to a court of law rather than to a domestic tribunal. The reasoning in *Twist's* case is, however, as it seems to me, in line with the reasoning of the Supreme Court of Canada in *King v. University of Saskatchewan* (1969) 6 D.L.R. (3d) 120 to which we were also referred, where it was held that a hearing before the ultimate appeal tribunal, in which the appellant was accorded a full measure of natural justice, cured any absence of natural justice in the inferior tribunals.

Applying the law as I take it to have been laid down in *Calvin v. Carr* [1980] A.C. 574 and in *Twist's* case, 12 A.L.R. 379, I have no doubt that in the present case, if there was any failure of fairness on the part of the district auditor, either in not offering the appellants an oral hearing or not offering them an opportunity to comment on his proposed findings before he rejected the appellants' representations as untrue, that failure was fully cured by the hearing in the Divisional Court under the statutory appeal process.

There remains the third question in this appeal, namely, whether the decision of the Divisional Court was correct on the merits.

As to this, it has been common ground between the parties that the law as it was at the relevant time as to the duty of a local authority to make a rate has been correctly stated by Woolf J. in his judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182. In the absence of a reasonable explanation, it was a breach of duty for the Liverpool City Council not to have made a rate by the beginning of the financial year or within a reasonable time thereafter. It was accepted by leading counsel for the appellants in this court, as in the Divisional Court, that it was not a justifiable excuse for the council's delay in making the rate until 14 June 1985 to say merely that the council was endeavouring to exhort money from central government by the threat that the council would not perform its legal duty to make a lawful rate.

It is said for the appellants that there was a reasonable excuse for not making the rate earlier than 14 June 1985 because until very shortly before that date the council was negotiating, or endeavouring to negotiate, with central government to obtain more government money for Liverpool, as had been achieved in the corresponding months of 1984. It is said further for the appellants, and this is really the gravamen of their appeal on the merits, that the appellants were not guilty of "wilful misconduct," as that term was interpreted by Webster J. in *Graham v. Teesdale*, 81 L.G.R. 117, 123 in the light of the earlier authorities, because (a) the appellants genuinely thought that further government money would be forthcoming for the city and (b) the appellants, though realising that there was a duty to make that rate not later than 20 June, never appreciated that there was any *obligation* on the council to make the rate earlier than 20 June.

Finally, and as a separate point, it is said for the appellants that the loss to the City of Liverpool relied on by the district auditor in making the surcharge was not caused by any act or omission of the appellants, but was caused by the voluntary decision of the Government not to pay

estimated rate rebates or estimated sums in lieu of rates in respect of Crown property until the council had made its rate for the year. This last point I regard as unarguable. The loss was plainly foreseeable as the Government had repeatedly declared its intentions, and the prospective loss had also been mentioned in reports from the council's own officers. The loss was caused by the appellants' acts and omissions just as much as those acts and omissions caused other ratepayers—e.g., commercial ratepayers in the city—not to make payments in advance of the rate being set and the rate demands being sent out.

On the facts, the Government had again and again and again made its position as clear as anyone possibly could that there would be no extra money available for Liverpool for the year 1985–86 and that the Government would not go back on, or re-open, the rate support grant report which had been approved by Parliament in January or February 1985. The appellants say that it was to be expected that the Government would say that, and that the Government had said much the same in the spring of 1984 and yet had made further money available for Liverpool. But the council's principal officers had clearly pointed out, in their joint memorandum of 16 April 1985 to the key Performance Review and Financial Control Subcommittee, that the circumstances of 1985 were not necessarily comparable to those surrounding the deferment of the rate in 1984.

For my part, I have no doubt that, from 1 April 1985 to 14 June 1985, no reasonable person could have expected that any further government money, of any significant amount beyond what had already been specifically agreed, would be made available to Liverpool for the year 1985–86. If the appellants, despite all appearances and the utterances of the Government, believed to the contrary and deferred making the rate in that belief, they acted recklessly in so doing. They knew that there would be an element of loss to the city if the making of the rate was delayed and they had no reasonable prospect of achieving any countervailing benefit from the Government.

There is the further point that the only financial matter even tenuously under discussion in April and May 1985 with the Merseyside Task Force or the Department of the Environment in London was in the context trivial—how much the council would be allowed in respect of two outstanding items (management support and monitoring and enhanced maintenance of environmental sites) in the urban programme for the previous year 1984–85. The total amount of government money in issue was about £1.75m. and the expenditure had already been incurred by the council in 1984. If the Government was prepared to provide the money, a larger sum (because penalties would be avoided) of around £5m. would fall to be deducted from the city's opening deficit in its accounts for the year 1985–86, but there would be no other effect on the budget-making process for that year. The council had not yet got around, apparently, to putting forward specific urban programme projects for the year 1985–86.

It is said in the appellants' collective representations to the district auditor that the arrival of the letter of 8 May from the Merseyside Task Force confirming that no further government money would be

forthcoming in respect of these two outstanding items of the urban programme for 1984–85 "had a profoundly disruptive effect upon the approach to budget-making" for the year 1985–86. Without doubting Councillor Hamilton's integrity, I cannot see how that can have been so, since the opening deficit for the year 1985–86 in the figures put before the council on 14 June 1985 when the rate was made was precisely the same as the figure for the opening deficit given in a memorandum of the city treasurer of 16 April 1985 prepared, obviously, on the footing that the amounts of government money available for the urban programme of 1984–85, even in respect of these two outstanding or final items, was already known. It would seem to be more correct to say that the receipt of the letter of 8 May, and of a further final warning from the district auditor dated 21 May 1985, accelerated the budget-making process which had been in abeyance since 16 April; we find that committees, such as the Library and Leisure Activities Committee, the General Services Committee, the Housing and Building Committee and the Planning and Land Committee, which had done nothing before, were all approving their budgets for 1985–86 in the last days of May.

I conclude therefore that the possibility or hope of obtaining further money from the Government does not on the facts provide any reasonable explanation or excuse for the failure to set a rate until 14 June and, furthermore, the appellants were acting recklessly in so far as they delayed setting the rate in the belief or hope that further government money would be forthcoming.

It remains to consider the appellants' case that they were not guilty of wilful default because they never appreciated that there was any *obligation* on the council to make the rate earlier than 20 June.

The appellants were selected for surcharge because of the pattern of their voting at meetings of the council on 30 January, 27 February, 7 March and 14 June 1985 when a number of highly political resolutions were passed and an opposition amendment, on 7 March, which called for estimates to be prepared and considered and for a meeting to be held to fix a rate, was defeated. The case argued by Mr. Hidden for the district auditor was that, from at least 30 January, the appellants had been conducting a political battle without regard for statutory and other obligations and duties; this had been the finding of the district auditor in paragraph 55 of his statement of reasons of 6 September 1985.

Members of the council were told very many times by the district auditor and his predecessor throughout 1984 and in the first five months of 1985 that the council had a duty to make an adequate rate. There is no reason to doubt that all the members understood this. They were also told, in a report of 19 March 1984, of which a reminder was sent later, that they could be personally at risk if a rate was not made because no vote was taken or there was unreasonable delay in making a rate. They were also told in June 1984 that a rate had to be set by 20 June at the latest because of the statutory right of ratepayers to discharge their rate liability by 10 instalments in the financial year. In fact in the year 1984 the rate was not made until July and in the circumstances of that year no action was taken on the score of delay in not having fixed the rate earlier.

Against that background, various of the appellants, such as Councillor Hamilton, Councillor G. A. Lloyd and Councillor Mrs. Adams have deposed to the effect that they believed that so long as a rate was made by 20 June they were not acting unlawfully or improperly. That may well have been a tenable view up to 16 April 1985 when Woolf J. gave judgment in *Reg. v. Hackney London Borough Council, Ex parte Fleming* (1986) 26 R.V.R. 182. However, on 16 April the three principal officers placed a joint memorandum before the Performance Review and Financial Subcommittee which made it clear to any councillor who read it—(i) that there was this important and highly relevant case involving the Hackney London Borough Council being decided that day; (ii) that while 20 June remained the final date for fixing a rate there had to be a good reason for deferring the making of the rate at all; (iii) that the circumstances of 1985 were not necessarily comparable to those surrounding the deferment of the making of the rate in 1984; and (iv) that deferment would involve loss to the council, not least in that the Government had made it plain that rate rebates would not be paid to any council so long as that council had not set a rate for 1985–86.

What actually happened, despite that memorandum, was that on 16 April 1985 progress towards making the rate for the year 1985–86 ceased. There had been progress in that on 26 March 1985 the Policy and Finance Committee had resolved that the city treasurer be requested to prepare summaries of all committees' income and expenditure, and that the income and expenditure of the Education and Social Services Committees be submitted to special meetings of those committees for consideration prior to the meeting—a special meeting—of the Performance Review and Finance Control Subcommittee on 16 April; that had all been done, the special meetings of the Education and Social Services Committees which approved their budgets being held on 12 and 10 April respectively. But on 16 April the Performance Review and Financial Control Subcommittee rejected opposition proposals deploring the delay in fixing the rate, demanding the calling within 10 days of a meeting of the city council to determine the budget and fix a rate, and requiring the circulation to all members of the city council of, inter alia, the joint memorandum of the three principal officers which I have mentioned and, instead, the subcommittee carried a motion which, after a long political preamble, referred the further budget-making process to meetings of the committees (other than the Education and Social Services Committees) and a further meeting of the subcommittee itself, which in the event were never convened. These proceedings of the Performance Review and Financial Control Subcommittee were approved by the Policy and Finance Committee, despite further opposition amendments, on 7 May 1985.

In these circumstances, and as the appellants had every opportunity of putting in as much evidence as they wished before the Divisional Court in relation to the matters set out in the district auditor's statement of reasons, including the opportunity of giving oral evidence, I would for my part conclude that those of the appellants (whichever they may have been) who decided the policy of the majority party on the city council in the first six months of 1985 knew perfectly well from 16 April onwards

that they were acting illegally and in breach of their statutory duty in delaying setting an adequate rate; alternatively, if they were not deliberately acting illegally, they were acting with blatant recklessness in disregarding the principal officers' advice.

As for the others—and I do not know which they were—they have chosen to follow their leaders. All the appellants joined in the collective representations to the district auditor. All have been represented together before the Divisional Court and in this court. In his judgment Glidewell L.J. records that in the hearing in the Divisional Court neither counsel for the Lambeth appellants nor counsel for the Liverpool appellants was able to point to any feature which distinguished any of their clients from the remainder; they both treated their task as being to present a single case on behalf of all their clients.

The observations of Devlin J. in *Rothnie v. Dearne Urban District Council* (1951) 50 L.G.R. 123, 125–126 are, in my judgment, apposite where he said:

> "it may seem, on the face of it, to be very drastic that 17 out of 27 members of an urban district council should be disqualified from election for five years because they either voted for or failed to vote against an illegal resolution. I confess that I find it a little surprising that we are asked to determine the matter on the basis that the position of these 17 members is exactly the same. I should have thought that different considerations might well have applied in different cases; . . . But the case has been presented to us with one affidavit on behalf of all 17 members in which their state of mind is stated to be exactly the same, and upon that basis the order which my Lord has proposed is, in my judgment, inevitably the right one."

As they have all, whether leaders or not, chosen to stand together, without any being distinguished from the remainder, the conclusion must be that all acted recklessly in delaying the making of the rate until 14 June 1985. The finding which I have referred to in paragraph 55 of the district auditor's statement of reasons is, on the full evidence before the Divisional Court, justified in relation to all the appellants, and all were guilty of wilful misconduct, with the consequences which follow from that.

I agree that this appeal should be dismissed.

Woolf L.J. I am fortunate in that as the facts leading up to this appeal have been fully set out in the judgment of Glidewell L.J. in the Divisional Court and in the judgment of Lawton L.J. in this court it is possible for me to turn directly to the principal issues raised on this appeal. They are: (a) whether the district auditor can lawfully issue a certificate under section 20(1) of the Local Government Finance Act 1982 without holding an oral hearing at which the persons to whom the certificate relates have an opportunity of presenting evidence and making representations ("the oral hearing issue"); (b) whether, if there is no statutory requirement to hold an oral hearing, the principles of fairness in the circumstances of this case require the auditor either to hold an

oral hearing or to give the councillors an opportunity to make additional representations, having regard to the conclusions to which the auditor was minded to come ("the fairness issue"); (c) whether the auditor and the Divisional Court correctly came to the conclusion that the councillors had been guilty of "wilful misconduct" ("the wilful misconduct issue"); (d) whether the auditor and the Divisional Court were correct in concluding that the alleged loss of £106,103 had been incurred or caused by the wilful misconduct of the councillors ("the loss issue").

In his admirable opening argument in this appeal on behalf of the 47 councillors he now represents, Mr. Blom-Cooper contended with justification that in coming to a decision on the issues raised in this appeal it is necessary to have in mind the background of severe urban deprivation which undisputedly exists in the City of Liverpool. For this reason he referred to the report of the Archbishop of Canterbury's Commission on Urban Priority Areas, *Faith in the City*, and in particular the passages in the report stressing the urgent need to stop the decay and begin the regeneration of inner city areas such as exist in Liverpool. He submitted that when viewed against this background his clients had behaved perfectly properly and were justified in stating on the first page of their representations to the auditor of 19 July 1985:

> "In all these matters, the members of the council have, throughout, acted in good faith and after taking advice from their officers. They have never at any time sought to avoid their duty to make a rate, or introduce unnecessary delay in its discharge. They have at all times had at the forefront of their minds the interests of the citizens and ratepayers of Liverpool in seeking to maximise the resources available to finance services, and to make improvements in living conditions of Liverpool people. In doing so they claim that they were entitled to exercise the degree of discretion which, as elected representatives the law allows them—and which the courts have frequently protected from undue interference by outside bodies."

With this submission in mind I now turn to deal with the principal issues I have identified.

The oral hearing issue

This issue can be dealt with as part of the next issue but I can deal with it separately since, as I understand Mr. Blom-Cooper's submissions as developed in argument, he was submitting for the first time in this court that the auditor was required as a matter of statutory construction of section 20 of the Local Government Finance Act 1982 to hold an oral hearing. No such argument was advanced in the Divisional Court. Indeed, in that court it was conceded that there was no such statutory requirement. However, Mr. Blom-Cooper was entitled to advance the argument on the appeal and I recognise that the argument has considerable force. It can be summarised in this way: the origin of the present jurisdiction of the auditor can be traced to section 8 of the Poor Law Audit Act 1848, that section gave the person who it was proposed to surcharge the right to be notified and attend and make oral submissions before the auditor and although the express right no longer

appears in the current legislation it is unthinkable that Parliament intended to take away this right particularly as an objector is still given the right to attend before the auditor by section 17(3) of the Local Government Finance Act 1982. Mr. Blom-Cooper in support of his argument referred us to the successive editions of the authoritative textbooks on the law relating to district audits by Mr. Carlton Roberts in 1919, Mr. Hurle-Hobbs in 1949 and the more recent and current editions by Mr. Reginald Jones. These works are published by H.M. Stationery Office and are undoubtedly highly authoritative, and while they have become less dogmatic over the question of the need for an oral hearing in the more recent editions, the earlier editions certainly express the view that an oral hearing is necessary and the later editions regard such a hearing as highly desirable. Furthermore, they contain precedents which presuppose such a hearing. Mr. Blom-Cooper also strongly relies on the fact that as a matter of practice, of which Parliament should be taken to be aware (subject to a sole exception in 1978 when the person surcharged was already convicted and in prison in relation to matters giving rise to the surcharge) so far as is known an oral hearing has always been offered before persons are surcharged and in fact has normally taken place.

The terms of section 8 of the Act of 1848 are as follows:

> "if an auditor shall see cause to surcharge any person now liable by law to be surcharged by him, and to whom no notice is now required by law to be given, with any sum of money in reference to any payment considered by him to have been illegally or improperly made, he shall, if the person be not present at such audit, cause notice in writing of his intention to make such surcharge to be given, by post or otherwise, to the person against whom he shall propose to make this surcharge . . . and shall adjourn the audit, so far as it shall relate to such particular matter, for a sufficient time to allow of such person appearing before him, and showing cause against such surcharge, and at such time the said auditor shall hear the party, if present, and determine according to law and justice of the case."

It is to be noted that the obligations upon a district auditor now are greater than they were at the time of the original legislation because of the requirement in section 20 that not only must misconduct be established, it must also be established that the misconduct was "wilful" which clearly adds to the gravity of the finding.

Support for Mr. Blom-Cooper's argument is to be found in *Hurle-Hobbs, The Law Relating to District Audit* (1949), p. 100, where it states:

> "The absence from the present statutory provisions relating to district audit of any requirement respecting the giving of notice to show cause against any action contemplated by the auditor can scarcely indicate an intention on the part of Parliament to withdraw from persons likely to be affected by his decisions the right to receive notice and be heard: a more likely explanation is that the obligation of any tribunal or person exercising judicial functions to

afford an opportunity for appearance and to listen fairly to both sides has become so fundamental a principle of English law as to render unnecessary any statutory provision in relation thereto;"

The probable reason for the change of emphasis in the textbooks on this subject is that in *Graham v. Teesdale*, 81 L.G.R. 117, Webster J. when dealing with the question of fairness in an appeal arising out of the grant of a certificate by a district auditor under section 161(4) of the Local Government Act 1972 (the predecessor of section 20 of the Act of 1982), accepted that there was no statutory requirement to have an oral hearing. However, in that case the appellant appeared in person and the full argument advanced by Mr. Blom-Cooper before this court would not have been before Webster J. I therefore do not pay the attention which I otherwise would to the view expressed by Webster J. In addition, in *Asher v. Secretary of State for the Environment* [1974] Ch. 208, 219, Lord Denning M.R. assumed that there was to be an oral hearing and that the person to be surcharged should have an opportunity of answering questions and of calling witnesses if desired, but this comment was obiter.

In considering whether Mr. Blom-Cooper's submission is correct, it is possible to distinguish the position under the Act of 1848 from that under the current legislation because in the 19th century the auditor was conducting his activities in public and the process of surcharging therefore took place in the same way, and this is no longer the situation. It is also possible to contrast the provisions of section 17(3) of the Act of 1982 which expressly provides that "any local government elector for any area to which those accounts relate, or any representative of his, may attend before the auditor and make objections," with the absence of any express provision as to attendance where the auditor is exercising his power under section 20 without there being an objection. However, I do not regard these points as being of significance. Indeed the reference to an objector having to attend in section 17(3) is surprising and probably explicable because of the historical background to this legislation, which is detailed in the judgment of Lawton L.J. The fact that the elector is required to attend to make an objection does not mean that today the auditor is required to inquire into the objections in public or to hear oral representations or evidence relating to the objection.

An objection can be made with the intention that the auditor should take action under section 19 or section 20 of the Act of 1982. However, the auditor can exercise his powers whether or not there is an objection and it appears to me clear that whether or not there is an objection the procedure under section 19 and section 20 must be the same. If an oral hearing is required where there is an objection an oral objection must equally be required where there is no objection. Likewise, if an oral hearing is necessary before the auditor exercises his power under section 19(1) to apply to the court for a declaration that an item of account is contrary to law, there must be a requirement for an oral hearing before the auditor exercises his powers to certify under section 20 which can

have more immediate financial consequences to and can effect the status of the person to whom the certificate relates.

The solution has to be found in accordance with the general principles applied by the courts where they are considering supplementing the provisions of legislation so as to give effect to what must have been deemed to be the intention of Parliament in passing the legislation in the terms used. Undoubtedly, having regard to the function which the auditor has to perform under section 20, Parliament must be taken to have intended that he should perform his duties fairly, but must it have intended he should do so by an oral hearing? The judicial activity of supplementing the express provisions of the legislation as to fairness has now been the subject of many judicial comments of the highest authority. An example, in a case which was cited on this appeal, is to be found in Lord Reid's speech in *Wiseman v. Borneman* [1971] A.C. 297, 308:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

Applying this approach, it would only be right to establish a "hard and fast" requirement for an oral hearing in addition to the general requirement of fairness if this was necessary having regard to the auditor's function under section 20. In my view it is not so necessary. Mr. Blom-Cooper was not able to point to any precedent for inferring a statutory requirement for an oral hearing in the performance of a quasi-judicial function of this sort and there clearly can be cases where justice can be done and the auditor can certify under section 20 without the need for an oral hearing and Parliament cannot be presumed to have required an oral hearing in all cases, if it may not be necessary in some cases. In this situation implying into the legislation a general requirement to act fairly, which alters depending upon the circumstances provides all the protection that is needed and so, notwithstanding the legislative history, it is this general requirement of fairness that I would import into section 20 and not the rigid requirement for an oral hearing for which Mr. Blom-Cooper contends. In expressing my reasons on this issue I have not made reference to the Code of Local Government Audit Practice, since I did not find that it provided any assistance on this issue.

The fairness issue

As there is no statutory requirement placed on the auditor to hold an oral hearing before he exercises his power to certify under section 20, he has a discretion as to whether to hold an oral hearing. This does not mean that the court's powers of intervention are limited to those which normally apply to the exercise of administrative discretions. The

discretion of the auditor is limited by the requirement that he must ensure that the proceedings are fair, and if in the view of the court the procedure adopted by the auditor is unfair, the procedure is unlawful and the court can intervene even though the auditor cannot be regarded as having acted unreasonably in adopting the procedure which he did.

In deciding whether in any particular case there was unfairness it is necessary to consider the particular function which was being performed by the auditor in making the decision, the nature and consequence of the decision and the matters in issue. Therefore, before examining precisely what happened in this case, it is helpful to examine the statutory framework under which the auditor was operating and in particular the effect of the right of appeal which is given by section 20, which Mr. Hidden in his helpful submissions argued could cure any failure of fairness on the part of the auditor in this particular case.

The first point that has to be made with regard to section 20 in the circumstances of this case is a point to which I have already alluded. This is that although it gives the auditor other powers, the power which he was exercising in this case was to certify that loss or deficiency had occurred due to wilful misconduct. Such a certificate in itself could cast a serious reflection upon the character of the person to whom it relates, can have grave financial consequences and where, as here, the persons concerned are members of a local authority and the amount involved is in excess of £2,000 the certificate has the further consequence of disqualification for the substantial period of five years. It is next to be noted that both under section 19 and under section 20 of the Act of 1982, before the auditor exercises any of the powers given to him by those sections, the same initial requirement is laid down by the statute, namely, that "it appears to the auditor." I only draw attention to this because under section 19 the auditor has no direct powers other than to apply to the court for a declaration, whereas under section 20, where he decides to certify in the absence of an appeal, the certificate becomes the final decision.

Whether the auditor is acting under section 19 or section 20, his role is at least in part inquisitorial. While he would always be under an obligation to look fairly into the objection and deal fairly with any person who can be affected by his decision, both under section 19 and under section 20 his role is not identical to that of a judge in court.

The power of appeal which is given by section 20 to the court is a wide one. It is accepted that the court grants a hearing de novo—a full re-hearing, and subsection (3) provides:

> "(*a*) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (*b*) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated . . . as if it had been given by the auditor . . ."

A There has been some uncertainty as to the effect of an appeal provision of this sort in relation to the adoption of an unfair procedure which, in the absence of a right of appeal, would undoubtedly result in the quashing of a decision.

In *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 Megarry J. dealt with the position with characteristic clarity. He was of the view that in general a right to appeal could not cure a breach of B the rules of natural justice. He said, at p. 48:

> "What is required is a venire de novo and not the process of appeal, whereby the person aggrieved may be treated as bearing the burden of displacing an adverse decision which, for the lack of natural justice, ought never to have been reached."

C Megarry J. said, at p. 49:

> "That is not all. If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and law combine to give the member a right to a fair trial D and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his E right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency F of natural justice in an appellate body."

As a matter of general principle, bearing in mind the importance of the requirement of fairness to any adjudicating process, I have considerable sympathy with the approach adopted by Megarry J. where there is no right to a re-hearing. However, Mr. Hidden relied strongly on the decision of the High Court of Australia in *Twist v. Randwick* G *Municipal Council*, 12 A.L.R. 379. That case concerned the power of a council to order the demolition of a building where there was a right of appeal against the order to a district court. Twist failed to exercise his right of appeal but instead sought a declaration that the order directing the demolition of his building was null and void, on the basis that before the order was made he should have been given an opportunity to be heard. The appellant's appeal against the refusal of a declaration was H dismissed by the High Court. Barwick C.J. was of the view that, because of the right of appeal there was no enforceable right to a hearing before the order was made. However, Mason J. and Jacobs J. took the view that the right of appeal did not in itself mean that there

was no right to a hearing before the order was made, it merely alters the consequences of a failure to accord such a hearing. Mason J. said, at p. 387:

> "Further, the earlier cases should not be regarded as deciding that the presence of an appeal to another administrative body is an absolute answer to a departure from natural justice or the standard of fairness. The existence of such an appeal does not demonstrate in itself that an inferior tribunal is at liberty to deny a hearing. But if the right to appeal is exercised and the appellate authority acts fairly and does not depart from natural justice the appeal may then be said to have 'cured' a defect in natural justice or fairness which occurred at first instance."

The judge then referred to a series of cases, concluding with a reference to *Denton v. Auckland City* [1969] N.Z.L.R. 256 and the *Leary* case [1971] Ch. 34 where a different approach had been taken. Mason J. then went on to say that he preferred the earlier line of cases rather than the *Denton* and *Leary* cases:

> "first, because the party affected has elected to treat the administrative decision as a valid, though erroneous decision, by appealing from it, in preference to asserting his right to a proper performance by the authority of its duty at first instance; and secondly, because in some cases the court will be compelled to take account of the public interest in the efficiency of the administrative process and the necessity for reasonable prompt despatch of public business and balance that interest against the countervailing interest of the individual in securing a fair hearing—in appropriate cases that balance will be achieved if the individual secures a fair hearing on his appeal."

Jacobs J. put it somewhat differently, saying, at p. 390:

> "However the second question remains. Is an order made without giving any opportunity to be heard invalid, that is to say, void and a nullity? Whether or not an order made without an opportunity to be heard will be wholly invalid depends upon the legislative provision read in the light of the nature of the subject matter and the provisions for review. Though the nature of the subject matter would tend to support an intention of total invalidity, I regard the wide provision for appeal in subsection (5) as indicating a contrary legislative intention. The appeal is to a judicial body in the fullest sense of that term. The determination must be made upon the evidence before the district court. I do not think that it would at all accord with the legislative intention that an owner should be able to ignore rights of appeal of the kind given by subsection (5) and instead rely on an absolute invalidity in the order which a council had made. A different view might be open if the appeal were to anything less than a court of the wide jurisdiction and consequent legal standing possessed by the district court; but in my opinion it was not the legislative intention that an order under the section, subject to appeal to the district court, should, without any resort to

A the right of appeal, be able to be treated for all purposes as void and of no effect upon the ground that the principle of natural justice had not been observed."

One of the cases which Mason J. preferred to the decision of Megarry J. in *Leary's* case [1971] Ch. 34 was the decision of the Supreme Court of Canada in *King v. University of Saskatchewan*, 6 B D.L.R. (3d) 120. In that case Spence J., giving the judgment of the court, took the view that any failure of natural justice before inferior bodies of the university was unimportant

> "when the senate, the appeal body under the provisions of the University Act, and also the body in control of the granting of decrees, has exercised its function with no failure to accord natural C justice": see p. 130.

In his judgment in *Leary's* case Megarry J. had distinguished *King's* case and preferred *Denton v. Auckland City* [1969] N.Z.L.R. 256, in which the High Court in New Zealand held that as the decision of a town planning committee lacked natural justice, the appeal board could not supply the deficiency of natural justice because the committee's decision D was a nullity. However, although Megarry J. found some support in this decision, he was correctly careful in my view not to base his decision on the use of the terms "void" and "voidable" which was the approach adopted in the New Zealand case.

The final authority to which it is necessary for me to refer on this point is the decision of the Privy Council in *Calvin v. Carr* [1980] A.C. E 574. That was a case involving the Australian Jockey Club. There had been a preliminary hearing before the stewards in which it was alleged that there was a breach of the rules of natural justice and there was then an appeal to the committee of the Jockey Club which was a hearing de novo when witnesses were present and available for cross-examination. The opinion was delivered by Lord Wilberforce who indicated, at p. 593, that Megarry J. had stated the position too broadly when he had F said that a failure of natural justice of a trial body could not be cured by a sufficiency of natural justice in an appellate body. Lord Wilberforce also indicated, at p. 595, that the passage in the judgment of Mason J. in *Twist's* case, 12 A.L.R. 379, 387, to which I have already made reference was "close to their Lordships' views."

The approach of the Privy Council, having analysed the various G earlier decisions in different jurisdictions, was, as Lord Wilberforce stated at p. 592, that:

> "no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be 'cured' through appeal proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that H this must be so. There are, however, a number of typical situations as to which some general principles can be stated."

Lord Wilberforce then dealt with three different categories:

"First there are cases where the rules provide for a rehearing by the original body, or some fuller or enlarged form of it. This situation may be found in relation to social clubs. It is not difficult in such cases to reach the conclusion that the first hearing is superseded by the second, or, putting it in contractual terms, the parties are taken to have agreed to accept the decision of the hearing body, whether original or adjourned. . . . At the other extreme are cases, where, after examination of the whole hearing structure, in the context of the particular activity to which it relates (trade union membership, planning, employment, etc.) the conclusion is reached that a complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage."

The third category was the intermediate category as to which Lord Wilberforce said, at p. 593:

"In them it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances where the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing. There may also be cases when the appeal process is itself less than perfect: it may be vitiated by the same defect as the original proceedings: or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a fair and full inquiry . . . In such cases it would no doubt be right to quash the original decision."

The appeal procedure under section 20 of the Act of 1982 obviously falls within Lord Wilberforce's intermediate category.

Finally, Lord Wilberforce quoted with approval a judgment of Cooke J. in *Reid v. Rowley* [1977] 2 N.Z.L.R. 472 and, having done so, went on to say, at p. 596, that their Lordships did not

"understand the Court of Appeal [of New Zealand] to be subscribing to a view that cases of 'insulation' or 'curing' after a full hearing by an appellate body, may not exist: on the contrary, Cooke J. expresses the opinion that the court, in the exercise of its discretion, when reviewing the domestic or statutory decision, should take into account all the proceedings which led to it, the conduct of the complaining party and the gravity of any breach of natural justice which may have occurred. This, though perhaps with some difference in emphasis, is their Lordships' approach."

Mr. Blom-Cooper criticises the reasoning advanced by Mason J. for his conclusion in the *Twist* case, 12 A.L.R. 379, and I consider that there is justification for that criticism and I certainly would not apply that reasoning to the present case. Mr. Blom-Cooper also sought to

A distinguish the *Twist* case and *Calvin v. Carr* [1980] A.C. 574, and while he does not quarrel with those decisions on the facts which were before the court he submits that there is a distinction to be drawn between domestic tribunals where contract has a part to play and bodies who are exercising judicial functions under a statute, particularly where the decision can affect the personal interests of the complainant. In this approach Mr. Blom-Cooper receives some support from Sir William B Wade in his authoritative textbook on *Administrative Law*, 5th ed. (1982), p. 488. However, I do not regard it as right to treat what Lord Wilberforce stated as being confined to non-statutory tribunals and in my view the approach of Jacobs J. in *Twist's* case, 12 A.L.R. 379 and Lord Wilberforce in *Calvin v. Carr* [1980] A.C. 574 provides considerable guidance as to the approach to be adopted in this case.

C In my view in cases such as this the question the court should ask is whether, taking into account the complainant's rights of appeal, and if those rights have been exercised what happened on the appeal, the complainant, viewing the combined proceedings as a whole, has had a fair hearing? I regard this approach as appropriate because if Parliament makes provision for an initial hearing followed by appeal then what Parliament should be presumed to intend is that the persons affected by D those proceedings should be treated fairly in the proceedings as a whole. Where there are shortcomings in the initial proceedings but the appellant has in fact been dealt with fairly when the proceedings as a whole are considered, to regard the proceedings as invalid would be to condemn something as being unfair because of a flaw in a part when if the whole was considered the flaw would be sufficiently insignificant to enable the E whole procedure to be regarded as unblemished. Expressing the matter slightly differently, if the whole procedure is properly regarded as being fair, then to strike that procedure down because of a flaw in part will be to apply an unduly technical approach. My view of the test receives some support in *de Smith's Judicial Review of Administrative Action*, 4th ed. (1980), p. 242 et seq. and is in accord with Lord Wilberforce's opinion in *Calvin v. Carr* [1980] A.C. 574. Furthermore it does not have F the flaw to which Megarry J. referred in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 because it presupposes Parliament gave the complainant no more than a right to a fair hearing in the proceedings as a whole.

Mr. Hidden also submitted that in this case even if there was a breach of natural justice, the court should not intervene because the G result would inevitably have been the same even if there had not been the defect in procedure. I recognise that there can be cases where such a submission will have to be considered by the court. However, I regard the authorities on which Mr. Hidden relies, including *George v. Secretary of State of the Environment* (1979) 38 P. & C.R. 609 and *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1595, as having application in very limited circumstances, and certainly I would not regard them as H applying here.

What, then, is the result of applying this test to the circumstances of this case? Mr. Blom-Cooper submits that the auditor's decision in particular was unfair because he rejected the truthfulness of the

explanation which the appellants put forward without their knowing that he was minded to do this and without his having the opportunity to assess their credibility in the manner which would have been possible at an oral hearing. In addition in his reasons for his decision the auditor relied upon five matters of which the appellants did not have notice. The appellants, it is contended, were thus prevented from dealing with these matters. Finally Mr. Blom-Cooper says the period which the appellants had in which to make their representations was unduly short and that when the district auditor wrote to the appellants on 21 May 1984 he could have given more information than he did. I regard the last two complaints as being manifestly without substance and I do not propose to take up any more time dealing with them. The other points are, however, of greater substance.

In the circumstances of this particular case, having regard to the history as to oral hearings before the district auditor in the past, it is surprising that both in this case and in the *Lambeth* case* the councillors were not given the offer of an oral hearing. They could have but did not allege that they had a legitimate expectation of such a hearing. I appreciate that where 49 councillors are involved an oral hearing might give rise to administrative problems and create delay, and the situation which existed in Liverpool could have been regarded by the auditor as one which required prompt action. However, in my view it would have been preferable to have invited representations as to whether there should be an oral hearing. This does not mean, however, that the procedure was unfair as a whole because this was not done. In this country we attach considerable importance to the benefits of oral hearings in the administration of justice. It has been suggested that we attach excessive importance to orality. I would refer here to the dissenting judgment of Hamilton L.J., which was subsequently indorsed in the House of Lords [1915] A.C. 120, in *Rex v. Local Government Board, Ex parte Arlidge* [1914] 1 K.B. 160, 192–193:

> "It is said that a written argument is an illusory thing, that there is no eloquence or at least no persuasion but in speech. Parliament should know something about that, and it has left the matter to the Board. I find the contention bewildering. Are reasoning and writing mutually exclusive processes? The appellant desires to enjoy what Mr. Upjohn felicitously calls 'the bound and rebound of ideas and arguments between the Bench and the Bar'. This invests with authority a practice (or should I say a foible) of judges, which I had believed to be pardonable and hoped to be not without its uses, but I am unable to see that it is the very pith of the administration of natural justice. It is said again that the appellant is entitled to a reply. . . . I think this is only procedure again."

In this case, in the note accompanying his notice to each individual ratepayer dated 26 June 1985, the auditor sets out the charge, specifies the duty which is placed upon the council under section 2(1) of the

* *Smith v. Skinner*, The Times, 6 March 1986; [1986] R.V.R. 45. An appeal by certain councillors of the Lambeth London Borough Council against the decision of the district auditor, Mr. B. Skinner. The appeal was heard at the same time as the present appeal, then sub. nom. *Gladden v. McMahon* [1986] R.V.R. 45.

General Rate Act 1967 and indicates that the rate was not made for the year commencing 1 April 1985 by the council until 14 June 1985 and then adds:

> "The facts leading up to this decision by the council are to be found principally in the minutes of the proceedings of meetings of the council, of its Policy and Finance Committee and of its Performance Review and Financial Control Subcommittee and also in reports of officers referred to in these minutes . . . The facts appear to show that there was no lawful justification for the delay in making of the rate. The council thus disregarded the advice and warning given by me my predecessors and its officers. On the evidence the council would appear to be in breach of its statutory duty. To the extent that a breach of statutory duty results from a deliberate failure by any member to discharge his or her own duty then such a member is guilty of wilful misconduct."

Finally the note identifies the loss which is alleged to arise as the result of the breach of duty. It is important that the note either in its appendices or by means of the documents which accompanied the note identifies the evidence on which the auditor relied.

At the outset of this judgment I indicated the general nature of the appellants' case advanced in their representations. If the representations which they were making were correct then they were inconsistent with the view which the district auditor was provisionally expressing as being his interpretation of the facts set out in the documents to which he referred. In these circumstances it should have been apparent that the representations could be rejected as being inconsistent with the contents of those documents. This is what happened and although the councillors may not have anticipated the district auditor's precise reasoning it should also have been anticipated that he could reject their representations and in doing so could impugn their motives and credibility. With regard to the alleged unfairness due to the failure to offer an oral hearing my conclusion is that the proceedings remained fair notwithstanding the absence of an offer of an oral hearing at the earlier stage. It is quite clear, as the appellants themselves said, that they wished to make a collective response. Such a response can satisfactorily be made in writing. The appellants made no request for an oral hearing which they could have done although the district auditor had indicated that he intended to deal with the matter in writing. In the Divisional Court the appellants had their opportunity for an oral hearing and they were offered and declined the opportunity to give evidence. While, therefore, it may have been preferable to offer an oral hearing, justice did not require such an offer at the earlier stage, and it is doubtful whether even if an offer had been made it would have been accepted.

I turn to the new matters on which Mr. Blom-Cooper relies. In his reasons the district auditor did not in fact find that the rate which was made was unlawful. He used the inadequacy of the rate as being an example of the contravention by the appellants of their officials' advice, which was a matter referred to in the note.

The second matter on which Mr. Blom-Cooper relies is the events of 1984 and their significance for 1985 and 1986. As the auditor referred to various documents relating to the previous year, he had done sufficient, in my view, to make it clear that he was relying on the events in the previous year in coming to his conclusion as to what occurred in the year directly under consideration.

The next matter relied upon by Mr. Blom-Cooper, namely, the lack of progress in the budget-making process I also regard as being adequately dealt with in the allegations of delay which appear in the note. The same is true on the remaining matters on which Mr. Blom-Cooper relies, namely, the failure to act on the advice from the officers and the negotiations with the Department of the Environment. I accept that there was further material which could have been put forward and was subsequently put forward before the Divisional Court by the appellants, but I do not consider that it can be said that the fact that there was not sufficient opportunity to put it forward earlier meant that the proceedings as a whole were rendered unfair or that the auditor was required to give an opportunity for further representations.

Accordingly I have come to the conclusion that when the proceedings, including the hearing before the Divisional Court, are considered as a whole the allegation of unfairness is not made out.

The wilful misconduct issue

It is convenient first to consider the question as to whether there was misconduct on the part of the appellants and then consider whether the alleged misconduct was wilful.

The argument on behalf of the appellants that there was no misconduct stems from the fact that the rating legislation contains no express statutory provision setting out the date by which the rate has to be made. In my judgment given on 16 April 1985, in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182, I indicated what I considered to be the position.

Subject to two qualifications made by Glidewell L.J. to which I should refer, both in the court below and before this court it has been accepted that what I said in the *Hackney* case generally reflected the legal position. The first reservation was that I may have been unduly generous in talking of weeks and it would have been preferable to talk of a few days rather than weeks. I would not dissent from this qualification. The second qualification arises because the General Rate Act 1987 as amended (section 50 and Schedule 10) gives to all ratepayers the right to pay rates by instalments and provides that a person wishing to pay by instalments may do so by not less than 10 instalments payable at intervals of at least one month. This provision did not arise for consideration in the *Hackney* case, and I agree with Glidewell L.J. that in order that ratepayers are able to complete their payments by the end of the following March they must start by the end of the preceding June, and as at least 10 days' notice must be given of the rate the last day on which a rate can be made is 20 June if the ratepayers are to have this opportunity of paying by instalments. However, whether the stricter approach indicated by Glidewell L.J. or the approach I indicated in the

Hackney case is adopted, it is quite clear in this case that the council would be in breach of duty unless there was a valid reason for deferring making the rate until 14 June 1985.

In their joint representations to the auditor, the appellants put forward as the explanation for the delay in making the rate that they wished to seek

> "to take maximum advantage of every avenue of negotiation open to them to maximise the resources available to the council. Negotiations in 1984–85 had had a marked measure of success. There was every reason to suppose in the light of that success that Liverpool could present its case in a manner which would again command respect and response. To attempt to add to Liverpool's resources—or to shield Liverpool from the worst consequences of the target—and penalty system is in fact evidence on the part of those making the attempt that they have acted with the highest degree of public responsibility. In the present case the motivation of the councillors has been throughout to ensure that the resources available to combat the deprivation in Liverpool and to sustain the services it offers to Liverpool people are as large as possible."

This reasoning is amplified by Councillor Hamilton and Councillor Byrne in their affidavits. I do not propose to set out all the relevant paragraphs. However I should refer to what Councillor Hamilton describes in his first affidavit as being "our reasons for not making a rate until 14 June." This, he said, could be stated very simply and shortly:

> "Our financial problems were so severe that it appeared that we could not meet our budget costs without an unacceptable rise in the rates or an unacceptable cut in jobs and services. We believed that there was a reasonable prospect of obtaining increased financial resources that would alter the calculations and hence the level of rate we would need to set. We believed this for a whole number of reasons which I will endeavour to set out below. Furthermore, we believed that there was no legal obligation to set a rate before 20 June 1985."

This statement was accepted by the other deponents. Councillor Byrne, who was chairman of the Performance Review and Financial Control Subcommittee, which was the primary committee dealing with the finances of the city, concludes his first affidavit by saying:

> "The decision to delay making the rate whilst attempting to seek substantial financial resources for the City of Liverpool at the risk of incurring possible increased interest charges by the withholding of apparently discretionary payments was, in my opinion, a purely political decision which the council was entitled to make and which it believed (wrongly as it turned out) would be more likely to produce a financial advantage, and an enormously greater financial advantage of that, to the city."

Although this may not be explicit in the passages to which I have made reference, it is implicit, and it was undoubtedly the case, that the

reason that it was the policy of the majority party to delay making a rate was to use the absence of a rate as a lever or weapon in the negotiations to obtain additional resources from central government. Even if the policy was adopted because it was thought that it was in the best interests of the people of Liverpool it does not alter the fact that to delay making a rate as part of this tactic is unlawful. As must have been appreciated by those who were responsible for choosing this tactic, it involves a threat that unless central government provides additional resources a rate would not be made and Liverpool's resources would be reduced so that eventually a state of financial chaos would result, as in fact very nearly happened as is illustrated by the purported dismissal of all teachers in Liverpool. What this amounts to is threatening not to perform a duty so as to take advantage of the undesirable consequences which will flow from the failure to perform that duty. This constitutes the clearest possible example of misconduct.

In addition, having regard to the history of the negotiations with the Secretary of State, and in particular the relatively small sum which it was hoped could be obtained as a result of the negotiations, when compared to the extent of the deficiency with which Liverpool was faced, the desire to negotiate could not be a reasonable explanation for the delay in making the rate. It would be wholly unreasonable to delay making a rate until 14 June merely to ascertain what additional provision, if any, by way of housing and urban benefit could be obtained.

The next question is whether this misconduct should be regarded as wilful? It would only be wilful if the councillors were doing something which they knew to be wrong or about which they were recklessly indifferent as to whether it was wrong or not: *Graham v. Teesdale*, 81 L.G.R. 117.

Even without my judgment in the *Hackney* case it should have been obvious to any councillor familiar with the rate-making process that it was not lawful to use the deferring of making a rate as a weapon or lever in the way that I have described. I regard it as significant that there is no evidence that the appellants sought advice as to whether it was permissible to use tactics of this sort. In addition, I consider that if there was any doubt in the matter the position was made abundantly clear by the reports of the district auditor and the council's officers in 1984 and 1985. I do not propose to lengthen this judgment by citations from those reports. It is sufficient if I draw attention to the fact that in March 1984 the chief executive, city solicitor and city treasurer, in their joint report, dealt clearly and explicitly with the practical consequences not only of failing to make a rate but of delaying making a rate, and in the same officers' report of 16 April 1985 delay in making a rate was dealt with in terms which made it clear that, while there might have been good reasons the previous year for delay, that did not apply to the current year. As the district auditor pointed out in his reasons, the rate which was in fact made by the council indicated that the appellants were prepared to act in disregard of the advice which they received. I agree with the Divisional Court that if the appellants collectively were not acting knowing what they were doing was wrong they were most

certainly acting recklessly as to whether what they were doing was wrong.

So far I have dealt with the position on a collective basis. I was, at one stage, concerned, after having read all the affidavits of the appellants, whether it was right to condemn all the appellants merely because they were prepared to cast their votes for the critical resolutions because they were the policies of the party of which they were members. However, although they filed individual affidavits, which in many cases indicate that they are otherwise not in the habit of indulging in unlawful conduct, I have come to the conclusion that it is not possible to distinguish between the appellants. They made collective representations as a matter of policy to the district auditor. They advanced a collective argument before the Divisional Court, and in this court no ground for distinguishing between them has been advanced. Therefore, although regrettably steps were taken by the majority party to avoid the wider dissemination of the report of the officers on 16 April 1985 at the meeting of the Performance Review and Financial Control Subcommittee of that date, and the report which would have been a further warning was not seen by all the councillors, it is not possible, in the circumstances of this appeal, to make a distinction between any of the appellants.

The loss issue

The argument of the appellants is that because it was a decision of central government to refuse to make the payments amounting to £106,103 this loss was not incurred or caused by the appellants' wilful misconduct. However, warnings had been given that the payments would not be made until such time as the rate was made, and undoubtedly the cause of the payments being withheld was the failure to make the rate. Although, therefore, decisions were no doubt made by the Department of Health and Social Security and the Treasury valuer not to pay the rate rebate element of housing benefit subsidy or to make the contributions in lieu of rates on Crown property, this was still the direct consequence of the council's action and therefore the resultant loss falls within section 20 of the Act of 1982.

There is one further matter with which I should deal which I consider of some importance. Before the Divisional Court Mr. Scrivener, on behalf of the district auditor, submitted that it was not open to the appellants to challenge the validity of the auditor's decision on the grounds of procedural impropriety on an appeal under section 20(3) of the Act of 1982 because he argued that an appeal presupposes that there has been a valid decision. He submitted that the correct procedure would be to apply for judicial review, and at the same time to enter an appeal which would only be heard if the decision were to be held invalid.

Glidewell L.J. considered, in principle, that this submission was correct. However, he regarded himself as being bound by the decision in *Asher v. Secretary of State for Environment* [1974] Ch. 208, a decision of this court, that the validity of the auditor's decision could be challenged on an appeal, but he went on to say that *Asher*'s case was only authority for the fact that an auditor's decision

"*may* be challenged by way of appeal under section 20(3), not that it cannot be challenged in any other way. That challenge, of course, arose after the appeal had been heard and decided. The decision, therefore, does not prevent the procedure suggested by Mr. Scrivener from being adopted, and it is my clear view that if the same situation arises again, this is the course which should be followed." See [1986] 26 R.V.R. 45, 55.

Before this court Mr. Hidden did not repeat Mr. Scrivener's argument but reserved the point having regard to the *Asher* decision in case there should be a further appeal.

In case the position is not clarified by a further appeal I feel it right that I should make it clear that I do not regard Mr. Scrivener's argument as being right in principle. Nor do I consider that it would be desirable that in the normal way decisions as to the procedural propriety of an auditor's decision should be challenged by judicial review and not by way of statutory appeal. Mr. Scrivener, in support of his suggestion that the only appropriate method of raising this matter was by way of judicial review, relied upon *O'Reilly v. Mackman* [1983] 2 A.C. 237. However, in that case there was no statutory right to appeal. The normal approach in relation to judicial review is that if there is an appropriate statutory procedure that procedure should be followed rather than judicial review. This is of importance in relation to appeals from district auditors. First of all the ordinary time limit in respect of the statutory appeal is under R.S.C., Ord. 98, r. 3(2), only 28 days, rather than the general requirement on Order 53 that an application should be made promptly, and in any event within three months. Of more significance is the fact that the powers expressly given to the court under section 20 of the Act of 1982, as has already been pointed out, are wide. In addition to the power, which is equivalent to that on an application under Order 53, to quash the decision, there is power to vary the decision and to give any certificate which the auditor could have given. This could be of very considerable significance in a case where a certificate has wrongly been refused by an auditor because he had, for example, refused to hear an objector fairly. If application has to be made first for judicial review by the objector, if the objector was successful the matter would have to be remitted to the auditor, whereas if the objector could appeal this would be unnecessary and the court could give the certificate which the auditor should have given if he had acted fairly. It can also be of significance in the case of an allegation of unfairness where there is no objection, as the facts of this case indicate.

I appreciate that the additional inconvenience of bringing two sets of proceedings is not a substantial argument against the course which was recommended in the Divisional Court. However, if there is no requirement to have two sets of proceedings I cannot see that there is any advantage in recommending a course which must involve limited additional expense. There are many statutory appeals by applicants in respect of decisions by ministers and others where questions of fairness are regularly considered by the courts without any necessity for judicial review, and if the court considers that it is desirable for an allegation of

procedural impropriety to be taken first this can always be done. My principal concern, however, is that I can foresee considerable delay and disruption being caused to the very important role of the auditor under section 20 if persons aggrieved by a decision as to procedure can seek to apply for judicial review independently of the right to appeal. In the normal case it would certainly be most undesirable if the High Court should be asked to intervene by way of judicial review before the auditor had come to his decision on the merits.

For these reasons, as well as the reasons given in the judgments of Lawton and Dillon L.JJ. I agree that these appeals must be dismissed.

Appeals dismissed with costs.
Judgment of Divisional Court of Queen's Bench Division affirmed.
Any expenses incurred by district auditor not recoverable under order for costs in appeal to be paid by Liverpool City Council.
Leave to appeal.

E. M. W.

The councillors appealed.

Louis Blom-Cooper Q.C., Beverley Lang and *Heather Williams* for the appellant councillors. The issues arising on this appeal may be formulated as follows. 1. Is an auditor, in carrying out an audit under section 20 of the Local Government Finance Act 1982, obliged to offer any person who is likely to be adversely affected by the audit an oral hearing because: (a) on a proper construction of the statutory provision such a duty is to be imported (or implied); or (b) such a duty arises from a legitimate expectation? 2. If submission 1 is wrong, and the auditor has a discretion whether to offer a person who is likely to be adversely affected by the audit an oral hearing, should such an opportunity, in fairness, have been given to the appellant councillors by the district auditor? 3. If the district auditor was in breach of the principles of fairness, was such breach curable by the appellate process under section 20(3) of the Act of 1982, and, if so, was it so cured by the appeal to the Divisional Court? 4. Did the district auditor and the courts below, in concluding that the appellants were guilty of wilful misconduct in delaying the making of the rate for the financial year 1985–86, apply the right test in judging the decisions and actions of the appellants? 5. Has the auditor conducted an "audit" in accordance with section 20 such as to conclude that there has been a loss of notional interest?

On 1, it is the *duty* of a district auditor conducting an ordinary or extraordinary audit under section 20 to offer to any person likely to be affected by the issue of a certificate an opportunity to make oral representations to him. The appellants had a *right* to make oral representations, if they wished to do so, and the auditor had no discretion whether to offer an oral hearing: he was bound to do so. He

failed to give the appellants any such opportunity; his certificate is therefore invalidated and should be quashed.

The right to an oral hearing arises out of either one of two legal sources: legitimate expectation and statutory construction. (The appellants are content to adopt Lawton L.J.'s historical survey, which is a perfect analysis, adding just a few references.)

As to legitimate expectation: (a) since for 140 years district auditors have invariably offered persons affected by the audit an oral hearing, there was a legitimate expectation that the appellants would be so afforded. That constituted a public law right that could not be qualified save by express statutory provision. (b) The Poor Law Amendment Act 1844 (see sections 32 and 33) marked the inauguration of the office of dictrict auditor, giving the auditor power to deal with illegality and misconduct in relation to the collection and administration of the poor rate. At that date, the poor law accounted for by far the major part of local expenditure. (c) The Poor Law Audit Act 1848 laid down procedure for the auditor in exercising his surcharge jurisdiction. Section 8 provided that, if an auditor saw cause to surcharge any person, he should give that person notice and allow him to appear before the auditor to show cause why he should not be surcharged; see also section 4. (d) The Act of 1848 was repealed in 1927. Section 8 was re-enacted in section 153 of the Poor Law Act of that year. (e) The poor law system was abolished by the Local Government Act 1929 and the Act of 1927 was repealed. (f) Between 1848 and 1929, district audit provisions had been applied to a wide range of public authorities in addition to the Poor Law. The Public Health Act 1848 introduced a code of district audit procedure that ran parallel to the poor law audit and did not contain a specific provision requiring an auditor to offer a person liable to be surcharged the opportunity of an oral hearing. However, in practice district auditors gave persons at risk an opportunity to attend to make oral representations even where there was no statutory requirement to do so. It appears that they were advised to do so in a memorandum issued by the Local Government Board: see *Carson Roberts, Audit Law and Audit Work* (1919), pp. 112, 166. (g) The audit legislation since 1929 has been silent on the question of an oral hearing. The appellants adopt the observation in *Hurle-Hobbs, The Law Relating to District Audit* (1949), p. 100: "The absence from the present statutory provisions relating to district audit of any requirement respecting the giving of notice to show cause against any action contemplated by the auditor can scarcely indicate an intention on the part of Parliament to withdraw from persons likely to be affected by his decisions the right to receive notice and be heard: a more likely explanation is that the obligation of any tribunal or person exercising judicial functions to afford an opportunity for appearance and to listen fairly to both sides has become so fundamental a principle of English law as to render unnecessary any statutory provision in relation thereto; . . ." (h) The repeal of the express statutory requirement for an oral hearing has not made any difference to the practice of district auditors. From at least 1848 to 1985 it has been their invariable practice to offer the opportunity of an oral hearing to persons at risk of surcharge for misconduct: see *Carson Roberts, Audit Law and Audit Work*, pp. 112 et

A seq., 166; *Hurle-Hobbs, The Law Relating to District Audit,* pp. 99, 100, n. 6, 103, 108–109 and precedents at pp. 160 et seq.; *Jones, Local Government Audit Law,* 1st ed. (1981), paras. 10·32 and 10·33, pp. 277–278, and 10·60, p. 287; 2nd ed., paras. 1·11–1·15, p. 5, 10·67, p. 294, and precedents at p. 376 (cf. paras. 10·35 and 10·36, p. 284, following the decision in *Graham v. Teesdale* (1981) 81 L.G.R. 117). The only occasion since 1972 on which an oral hearing has not been offered in a B misconduct case (other than in the cases of the Liverpool and Lambeth councillors) was in 1978 in the case of a surcharge relating to Islwyn Borough Council when the person at risk was in prison. The failure to offer the hearing in that case was an error of law on the part of the auditor. [Reference was made to *Rex v. Roberts, Ex parte Scurr* [1924] 2 K.B. 695, 698; *Taylor v. Munrow* [1960] 1 W.L.R. 151, 156; *Asher v.* C *Lacey* [1973] 1 W.L.R. 1412, 1415D and *Asher v. Secretary of State for the Environment* [1974] Ch. 208.] (i) The practice is an intrinsic part of the audit system, such that any person affected would have had a legitimate expectation that he would be offered the procedural safeguard against jeopardy of his interests: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374. (j) The right to an oral hearing based on legitimate expectation has not been limited or restricted D in any way by the local government audit legislation of 1933, 1972 and 1982. The legitimate expectation of an oral hearing survived each successive piece of legislation: see the Act of 1933, ss. 229, 230, 236 and 247, the Act of 1972, ss. 161(1)–(3) and 154–172 and the Act of 1982, ss. 11–25. [Reference was made to the Code of Local Government Audit Practice for England and Wales (made under section 14 of the E Act of 1982), paras. 16 and 17.] Even if the auditor's decision is in favour of the councillor whose conduct has been objected to, he must give him the opportunity of making oral representations.

There was no fundamental change in 1972 from the position under the Act of 1933 except for section 161(1) to (3): see *Pickwell v. Camden London Borough Council* [1983] Q.B. 962. By contrast, see section 161(4). It cannot be that Parliament envisaged that there could not be F an oral hearing before the auditor. Subsections (1) to (3) are not a mere alternative with regard to unlawful items of account: it is an entirely different procedure. Comparing the relevant provisions in the Acts of 1933 and 1972: (a) as to the duty of the district auditor, the only change of substance (as opposed to wording) was the removal of "negligence" and the insertion of "wilful" (section 161(4) of the Act of 1972); (b) as G to disqualification, under both statutes the disqualification only took effect once the time for appeal had elapsed or the appeal was finally disposed of (section 161(7) of the Act of 1972); (c) as to payment and recovery, under both statutes the sum certified by the district auditor was due to be paid within 14 days unless there was an appeal, in which case it was payable once the appeal was finally disposed of (section 161(8) of the Act of 1972); (d) as to appeals, the only changes of H substance were: (i) the Act of 1972 did not provide for "applications for relief" (section 230 of the Act of 1933); (ii) the Act of 1972 did not provide for an appeal to the Minister. The audit has in the past had a public character, and it did not lose that character after 1933. The

hallmarks of the public nature of the audit are: (1) provision for inspection of the accounts; (2) the right to attend and make objections; (3) public advertisements of the dates of inspection and audit. These provisions were introduced in the legislation of the 1840s and have remained in existence ever since.

As to *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, see at pp. 401 (Lord Fraser of Tullybelton), 412c (Lord Diplock) and 415B and 419 (Lord Roskill). The following submissions are made on the case: (1) the claimants are the persons who form the class on whom the regular or invariable practice was designed to confer the benefit or privilege; (2) every person within that class at any one time is a proper claimant to the practice. Though there is no authority directly on the point, legitimate expectation is to be viewed objectively. [Reference was made to *Raymond v. Honey* [1983] 1 A.C. 1.]

As to statutory construction: (a) as a matter of statutory construction of section 20 of the Act of 1982, Parliament intended that the district auditor should be under a duty to afford the persons affected by the audit an opportunity for an oral hearing; (b) after 1972, the issue to be determined by the auditor became a more serious one: "wilful misconduct" replaced "negligence or misconduct." The change in the legislation has increased, not lessened, the necessity of an oral hearing, particularly since a finding of "wilful" misconduct involves a subjective judgment by the auditor.

On 2, if, contrary to the appellants' submissions above, the auditor had any *discretion*, the requirements of fairness or natural justice dictated *either* that he should have offered the appellants an oral hearing at the commencement of the notice procedure on 26 June 1985, *or*, if he was initially entitled to seek written representations, that he should have offered each of the appellants an oral hearing subsequently to give them an opportunity to answer those allegations that subsequently appeared in his statement of reasons but had not appeared in his notice of 26 June.

As to the requirements of fairness or natural justice: (a) the requirements of natural justice that bind an auditor in such circumstances as the present are conditioned by two main factors: (i) he sits as inquisitor on charges laid and evidence assembled by himself; (ii) the consequence of an adverse finding by him are of the utmost gravity both for the individuals concerned and for the citizens that they were elected to represent. (b) In consequence, the standards of fairness that he must adopt are high and the procedure giving them effect must be appropriately measured. The procedure adopted by the auditor did not meet the standard of fairness required by law. (c) The auditor wrongly deviated from the long-established practice of offering an oral hearing to those at risk of surcharge. (d) The auditor was under an obligation to give full notice of and a full opportunity to answer every adverse suggestion or material matter initially prompting his inquiry *and* every adverse suggestion or material matter that, although not initially canvassed by him, presented itself to his mind in the course of his inquiry. (e) He failed to observe those requirements. His findings included: (i) a finding or assumption that the amount of the rate made on 14 June was unlawful; its unlawfulness was a relevant factor in his decision; (ii) a

finding that the true motive of the appellants in reaching their decisions to defer making a rate was not that set out in their evidence to him but a wholly or chiefly collateral motive. The auditor gave the appellants no notice that he was considering making such findings and no opportunity to be heard or even to make written representations about them. (f) Since the auditor disbelieved the truth of the appellants' assertions and decided that they had not been acting in good faith in reaching their decision to defer setting the rate, it was of the utmost importance that he should give them an opportunity to be heard (*In re Smith and Fawcett Ltd.* [1942] Ch. 304; *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551). He adopted a procedure that was unfair to the appellants and/or in breach of the rules of natural justice. Those defects of procedure were fundamental and vitiated the decision to surcharge. The certificate must, therefore, be quashed. Once Lawton and Dillon L.JJ. had concluded that the auditor had exercised his discretion wrongly and acted unfairly in not offering an oral hearing, they erred in holding that his wrong exercise of discretion did not invalidate his certificate: see *Leary v. National Union of Vehicle Builders* [1971] Ch. 34; *Wade, Administrative Law,* 5th ed. (1982), pp. 487–489.

Further as to the duty to act fairly, see the report of the Royal Commission on Tribunals of Inquiry (1966) (Cmnd. 3121), para. 32, pp.17–18 (the six cardinal principles; see especially no. 2, also 3(a) and 4); and para. 48, p. 22.

As to Woolf L.J.'s approach to the overall interpretation of section 20, the approach of simply going to the section and looking at it in its entirety may provide the answer to the question: what did Parliament intend to provide? Cf. *Twist v. Randwick Municipal Council* (1976) 136 C.L.R. 106: no requirement was imposed there for an inquisition before the order was made. Here, it is conceded that there was a requirement of inquisition. It is conceded that the auditor was performing a judicial function and had a duty to be fair. He had to give notice of the inquisition and some idea of the matters under inquiry. That is all implicit in section 20(1). Parliament is thus clearly contemplating that fairness will operate at the auditor stage, and, of course, on appeal to the High Court. Could Parliament, therefore, have been saying that the councillor might have to wait for the appeal to the High Court before he got fair treatment?

The failure to give the councillors the opportunity to come before the auditor was a *fundamental* defect. That is why it could not be cured by appeal to the Divisional Court. It was such a fundamental flaw that the appeal court was *bound* to quash the auditor's decision, notwithstanding that its hearing was a rehearing and that it was entitled to substitute its own view for that of the decision-maker. It cannot be said that breaches of natural justice are permissible because Parliament has provided an appellate process.

On 3, while there is no clear, absolute rule on the question whether procedural irregularity in the original hearing can be cured through the appellate process, the auditor's failure to conduct an oral hearing or to give the appellants an opportunity of an oral hearing, either initially on 26 June 1985 or afterwards on 9 July, was a failure, a procedural

irregularity, that was not curable by the appellate process on appeal to the Divisional Court. A

The appellants' submissions on the principles governing curability and the public/private law dichotomy are as follows. 1. In private law, where the courts are asked to resolve domestic disputes between private parties, they will be disinclined to introduce too great a measure of formal jurisdiction. Issues should be settled by reference to agreed procedures and do not require the formalities of the judicial process. B (This is a summary of what Lord Wilberforce said in *Calvin v. Carr* [1980] A.C. 574, 593C–H.) 2. This private law approach is not apt and does not pertain in the field of public law. In private law situations the matter can be left to individuals and groups of people to negotiate a workable and equitable system for adjudication of their disputes arising out of contract. 3. In public law, the power of the administrative arm of C government (and auditing of accounts of local authorities is such an arm), a stringent adherence to due process is called for. 4. Hence, the public law approach to defects in due process differ markedly and in legal principle from those in private law, if only because the role of the courts in the former case is to protect the citizen against incursions by government into civil rights. Courts stress the need for fair procedures that have not been "bargained for." 5. The public law considerations D come near to an absolutist rule along the continuum of cases of potential cure. 6. As to this absolutist view in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34, 47D et seq. (see particularly at p. 49F), Megarry J. stated the principle that "a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body." Of this principle, Lord Wilberforce in *Calvin v. Carr*, E at p. 593, said that "it affirms a principle which may be found correct in a category of cases" but that it overlooked cases based on "the rules and on the contractual context." Thus the absolutist rule has a definite role to play. The question is to define the occasion and limits of its applicability. It has a precise role in the public law field, where the courts are inclined towards intervention.

As to public law: 7. Where a person's rights are affected by a F decision-making process under a statutory scheme, the principle is that on appeal a court of wide jurisdiction can cure a procedural irregularity of the tribunal a quo, but *only* if: (a) the appellate process is in reality a rehearing of all the evidence, and not just a review (special jurisdiction); (b) there is an expertise in the appellate body comparable to that statutorily required in the tribunal a quo; (c) there is express statutory G language authorising an expeditious hearing; (d) "cure" must not be permitted if the effect is to endorse malpractice.

As to special jurisdiction, the appellate jurisdiction must reflect the full extent of that jurisdiction enjoyed by the tribunal a quo. Thus, not only must the appellate court be empowered to make any orders that could have been made by the tribunal a quo but it must also do so after having heard de novo the evidence relevant to the issue before the H tribunal a quo. It does not suffice to review the evidence already adduced, topped up (if necessary) by fresh evidence. If the appellate court had no power to remit a cure to the specialist tribunal a quo, then

A if it rehears the issue itself the decision can stand and the "cure" is applied, but not otherwise. Here, there is power to remit; see *Jones, Local Government Audit Law*, 2nd ed., para. 9.29, p. 265 and R.S.C., Ord. 55, 7(5).

As to expertise, the special jurisdiction of curability is exercisable only in cases where the special knowledge, skills and experience of the tribunal a quo do not need to be employed in the appellate process. B Otherwise, the appellate court will be arrogating to itself a function that Parliament has entrusted to the specialist tribunal a quo. The appellate court is statutorily restricted to curing minor errors that can be corrected without prejudice to the appellant. Since the appellate function is wholly a creature of statute, there can be no resort to any inherent jurisdiction or common law principle.

C As to expedition, principles of fairness are not inflexible in their application, especially where discretionary remedies are being sought. If this were a case of judicial review, and not the exercise of a statutory right of appeal, practical considerations might influence the court in the exercise of the jurisdiction not to enforce the principle of fairness to the full extent. One such instance is that of urgency, where the public interest demands swift action (see *per* Mason J. in *Twist v. Randwick* D *Municipal Council*, 136 C.L.R. 106 (the C.L.R. report 13 preferable because it contains the argument), 117, where he relied heavily on this ground, and *Calvin v. Carr*, at p. 596H (Lord Wilberforce)). The principle of urgency may negative the presumption of fairness, but only where the statutory scheme clearly so indicates and the particular circumstances require the appellate body to assume primary discretionary E power rather than causing the whole issue to be dealt with by the tribunal a quo. In public law, the urgency principle is parasitic on clear statutory words and demonstrable need. Thus R.S.C., Ord. 53, r. 4 (judicial review) places a time-limit on application. Here there is a statutory right of appeal under sections 19 and 20 of the Act of 1982. Orders 55 and 98 do not evince any comparable urgency. Ord. 55, r. 4(2) provides a time-limit of 28 days. Ord. 98, r. 2(2), calls for filing F seven days after lodging notice of motion, but Ord. 98, r. 2(4), says that the motion shall be entered within six weeks but not ordinarily heard sooner than 28 days after service of notice; see also Ords. 54 and 59, r. 19(4). [Reference was made to *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243, *per* Lord Wright, and *Q.T. Discount Foodstores Ltd. v. Warley General Commissioners* [1982] S.T.C. 40, 43–46, *per* G Vinelott J.]

The appellants' submissions on *Calvin v. Carr* [1980] A.C. 574 are: (i) it was clearly a case within the field of private law: a domestic or contractual dispute; (ii) the hearing before the committee of the Australian Jockey Club on appeal was a case of venire de novo, or not a case where the evidence was freshly given; here, there would not have been a venire de novo even if the appellants had elected to give H evidence before the Divisional Court, if the hearing before the Divisional Court had been de novo, a fresh hearing, with all the evidence, the appellants would not argue to be inserted; (iii) emphasis was there placed on the urgency of the review procedure; (iv) great reliance was

placed on the fact that expertise on horse racing had been before both the stewards and the committee of the Australian Jockey Club; (v) Lord Wilberforce accepted that there were cases in the "second category" where the *Leary* principle applied; he did not in any way qualify that principle.

In public law, it is essential that the principles of natural justice be observed at all stages, a possible exception being where the appellate hearing is a complete rehearing. What Lord Reid said in *Ridge v. Baldwin* [1964] A.C. 40 is still good law. As to the distinction between "void" and "voidable," see *London & Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. 182.

On 4 and 5, section 2 of the General Rate Act 1967 does not specify any time-limit within which the rate must be fixed. The council had, therefore, discretion as to the date of setting a rate. Such discretion fell to be exercised on the application of basic principles of law. Provided that the appellants did not infringe any statutory requirements or any legal rights of any person, they were entitled in their discretion to defer making a rate. That discretion was exercisable according to the principles laid down by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. The only statutory constraint on the date of setting the rate was the right of ratepayers to pay their rates in 10 monthly instalments.

The council, in common with all other local authorities, had: (a) a range of statutory duties to perform, e.g. education, social services, housing; (b) a common law duty to advance the interests of its population; (c) a common law duty to protect the interests of its ratepayers; (d) a power and a duty to act within the ambit of those duties according to the political judgment of a majority of its members. It had to have regard to the above duties, among other relevant considerations, when it exercised its discretion on the timing of the rate. As to that, it was doing its best within its legal powers to maximise the city's resources and to minimise the burdens on the people of Liverpool for the year 1985–86. The delay in making a rate was a bona fide and legitimate exercise of its discretion as to timing, directed to the above end. The appellants both reasonably and rightly believed that to set a rate by 20 June would not be a breach of duty. In the period leading up to the making of the rate the appellants believed that the Government would provide additional resources because of their experience in 1984 and because of assurances given to them by Mr. Patrick Jenkin in meetings during 1984 and a letter of 29 June. The council was also negotiating with the Merseyside Task Force over two outstanding items in the 1984–85 programme, with a budgetary effect of some £4·6m. and thus, at all times, a major consideration in the minds of the appellants. Without disregarding any of the relevant considerations or taking into account irrelevant considerations and without any breach of duty the appellants decided to defer making a budget and rate for as long as they considered reasonable, bearing in mind the "dead-line" of 20 June, to enable them to continue to negotiate with the Government for increased funds prior to the making of the budget and rate. The course of conduct adopted by them was a legitimate exercise of their discretion, and the

A Court of Appeal, in deciding that the council had acted unlawfully in deferring the setting of the rate, failed to apply the correct legal principles when determining the legality of its actions.

In finding that the appellants' reason for deferring the setting of the rate was unreasonable or irrational the Court of Appeal wrongly: (a) drew conclusions on the facts that were not justified by the evidence; (b) determined the question of unreasonableness by regarding the facts as B they had turned out to be and not as they had appeared to the appellants at the time when they had been making their decision; and in so doing the court: (c) substituted its own view of what was reasonable or sensible or prudent for the views of the appellants; (d) wrongly interfered with the exercise of the council's discretion and adjudicated on a political judgment by a local authority.

C If, contrary to the above submissions, the council acted unlawfully in deferring the making of the rate until 14 June, it is conceded that, for the purposes of section 20 of the Act of 1982, the appellants were guilty of "misconduct" by voting for that deferral. However, they were not guilty of "wilful misconduct" within the meaning of section 20, and, therefore, the certificate must be quashed. The appellants rely on the D definition of "wilful misconduct" given by Webster J. in *Graham v. Teesdale*, 81 L.G.R. 117, 123: "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not." The appellants believed their decisions to be proper and within the law. They did not believe that the deferral of the rate was unlawful, nor were they recklessly indifferent as to whether or not it was unlawful.

E The auditor's approach to the issue of wilful misconduct was erroneous in law. (a) The proper inquiry is: (i) did the councillors do something unlawful? (ii) If so, did they know of or shut their eyes to its unlawfulness? (iii) If so, did any and what loss or deficiency result? (b) The auditor instead asked: (i) Was there deliberate delay in making a rate? (ii) If so, did some loss result? (iii) Did the councillors know or F shut their eyes to the fact that loss would result from delay? (iv) Given the predictable consequence of delay, was there lawful justification for it? This analysis omits the essential element of wilfulness of misconduct and substitutes for it foresight of consequences. It also assumes that deliberate delay (if shown) is unlawful unless it can be justified in the light of its consequences: in public law, the opposite is assumed, namely that decisions are well made until successfully impugned.

G The authorities establish three propositions: (i) resolutions are not conclusive evidence of proceedings at a meeting of a local authority; what occurred may be proved by resort to extrinsic evidence. (ii) The question as to intention is of *corporate* intention, which is *expressed* in the resolution. (iii) The court will always adopt a much broader approach in determining *such intention* and will have regard to extrinsic evidence, H e.g. affidavits from councillors: see *Pickwell v. Camden London Borough Council* [1983] Q.B. 962, *per* Forbes J. and Ormrod L.J., at pp. 991, 998 and 1004, and *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182, 184–185, *per* Woolf J.

As to loss, in law a deficiency is caused or a loss incurred "by" conduct only if, without the voluntary intervention of another, the legal and/or necessary result of the conduct was such deficiency or loss. Here, the deficiency or loss: (a) was not caused in this or any true legal sense by the appellants; (b) was brought about by the voluntary act of central government. On the uncontested evidence, the temporary loss of income (reflected in the notional interest surcharge) was brought about by the voluntary act of central government not to pay moneys that they could lawfully have paid. The loss was not caused, in the appropriately proximate sense, by the appellants but by the counter-measure against the council's deferral of making a rate.

The appellants seek leave to argue the following points not argued in the Divisional Court or the Court of Appeal and to introduce fresh evidence in support of those points. (a) The auditor had not carried out the audit of any accounts or the extraordinary audit when he purported to issue the certificate, and, therefore, he had no jurisdiction to issue the certificate. (b) Alternatively, he failed to carry out the audit in accordance with the Code of Local Government Audit Practice, and, therefore, the audit and the certificate are invalid. (c) Further or alternatively, he erred in concluding that a loss had been incurred.

Anthony Hidden Q.C. and *Mark Lowe* for the district auditor. The first question is whether, on a proper construction of section 20 of the Local Government Finance Act 1982, a district auditor is required in all cases to offer to a person the subject of possible certification under the powers granted by that section an oral hearing before a certificate may be issued.

The statute law regarding the duties and powers of a council and councillors with regard to the making of a rate is contained in sections 1(2) and 2 of the General Rate Act 1967 and sections 83 and 151 of the Local Government Act 1972. As to the councillor's oath, see section 83 of the Act of 1972 and Schedule 3 to the Local Elections (Principal Areas) Rules 1973 (S.I. 1973 No. 79). That is the duty that a councillor (a volunteer) binds himself with, and it is the control of those duties that is delegated to the auditor (see the Local Government Act 1933, ss. 226–229).

The Act of 1982 makes no express requirement on the auditor to appoint an oral hearing. The earlier practice of auditors to hold such a hearing was referable in part to the fact that the audit was a public proceeding held in an appointed place at an appointed occasion, and partly to the tradition of conducting all judicial and quasi-judicial proceedings orally. Audits no longer attract that public quality. It is the modern practice for audits to be conducted in private in a manner convenient to the public by means of publication by the auditor. The Act of 1982 does not require the auditor to proceed in public when hearing an objection made by an elector under section 17(3): see *Reg. v. Farmer, Ex parte Hargrave* (1980) 79 L.G.R. 676. The Act gives rise to no expectation of or right to a hearing. On the contrary, section 16 empowers the auditor to require persons to attend before him as he "thinks necessary" for the purposes of the audit. Had Parliament intended to make such a requirement on the auditor it would have done

A so expressly as it did in relation to his forebears by section 8 of the Poor Law Audit Act 1848 (11 & 12 Vict. c. 91). Parliament cannot be assumed to have incorporated into the Act a practice of the auditors to hold oral hearings in cases of surcharge without express words to that effect. In the absence of an express requirement in the Act to hold an oral hearing the need, if any, to provide such a hearing can only arise at common law, that is to say, if it is required by the rules of natural B justice.

It is not right to say that there was no change at all in 1972. Before 1972, there was inevitably an oral hearing, and it was the auditor's hearing. Under the Act of 1982, it is no longer his hearing. It is his certificate, accepted by the councillors or confirmed by the court (see the Act of 1982, ss. 19, 20). There was a public hearing up to 1972; the C auditor came to the area and sat rather like an assize judge. He did the audit. There is a specific direction now regarding the exclusion of the public: see paragraph 19 of the Code of Local Government Audit Practice for England and Wales (1984). When the hearing was public, the auditor had to give the person an oral hearing; now that it is not public he does not.

As to the duties and functions of the auditor, see *Asher v. Secretary* D *of State for the Environment* [1974] Ch. 208 (*per* Lord Denning M.R.) and *Graham v. Teesdale* (1981) 81 LG.R. 117. The auditor is really master of his own procedure, and whether he conducts an oral hearing or a hearing on documentation is in his own discretion. (A hearing on written representations could be fairer than an oral hearing.) [Reference was made to *Reg. v. Local Government Board, Ex parte Arlidge* [1914] 1 E K.B. 160, 191; *In re Smith and Fawcett Ltd.* [1942] Ch. 304; *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551 and *Maxwell v. Department of Trade and Industry* [1974] Q.B. 523.]

The second question is whether, if there is no statutory requirement for an oral hearing, the principles of natural justice required the auditor to offer such a hearing to the appellant councillors and each of them and what, if he ought at common law to have offered them such a hearing, F the consequences are of his failure to do so.

The auditor is under a duty to act fairly whilst exercising his powers under the Act, including those in section 20. There are no hard and fast rules relating to the procedure that he should adopt; these are matters within his discretion save where he is bound by the Code of Local Government Audit Practice (see *Rex v. Browne, Ex parte Butler* [1909] G 2 I.R. 333, 351 and *Colton v. District Auditor for Wembley Borough Council* (1962) 60 L.G.R. 247). In the absence of the statutory requirement to hold an oral hearing, he is entitled to exercise a discretion as to whether to hold such a hearing. That discretion must be exercised fairly. The decision whether to hold an oral hearing is a matter of pure procedure (see *per* Hamilton L.J. in *Rex v. Local Government Board, Ex parte Arlidge* [1914] 1 K.B. 160, 192–193). Whilst it is the H common practice of the auditor to hold an oral hearing, it does not follow that it is required in the interests of fairness in all cases. Before the decision not to appoint such a hearing can be impugned as contrary to the requirements of natural justice, the decision must be scrutinised

in the context both of the relevant facts and of the statute under which it arose. A

The auditor gave all the appellants written notice dated 26 June 1985 of the charge and identified the loss said to flow from their breach of duty in delaying in the making of a rate. The notice, by means of its appendices and the documents accompanying it, identified the evidence on which the auditor acted. He invited written representations in reply. None of the appellants, who included justices of the peace and a solicitor, made any request to the auditor to hear them orally. The appellants chose to make a single collective and detailed written submission. They have never contended that one individual's case can be separated from that of any other appellant. They adopted a common pattern of voting throughout. The evidence given to the Divisional Court was of the same character. The appellants all chose to reject the invitation extended by the Divisional Court to hear oral evidence from them. They have all appeared by the same solicitors and counsel. Their submissions to the Divisional Court and the Court of Appeal were collective, and their counsel indicated that he was not instructed to invite the court to distinguish between individual appellants, nor did he seek to do so. B C D

It was neither unfair nor surprising that the auditor requested a written response to the charge. The charge of wilful misconduct by its very nature called into question the motives and intentions of the appellants. Faced with a collective response, and no request on behalf of the appellants to the effect that they desired to have an oral hearing before he determined the matter, it was not unfair of the auditor to fail to offer one. There is nothing in the evidence presented by the appellants to the Divisional Court to the effect that they had desired such a hearing nor as to what course they would have adopted had such an offer been made. The overwhelming inference from the history of the matter is that the appellants at the outset made a decision to make a single collective response rather than multiple individual answers to the charge. That was a positive election they have conscientiously followed throughout. For individual appellants to give oral evidence to the auditor is inconsistent with that strategy and could be positively harmful to it. The appellants collectively could not afford an oral hearing because they could not afford to be cross-examined on the documents. It is not correct that the auditor never looked at the books. [Reference was made to *Jones, Local Government Audit Law,* 2nd ed. (1985), paras. 1–18 and *Reg. v. Liverpool City Council, Ex parte Ferguson,* The Times, 20 November 1985.] E F G

To sum up: 1. The auditor, in the course that he pursued in coming to his decision to issue his certificate, was (i) following the requirements of statute law; (ii) following the requirements of fairness inherent in the principles of natural justice. 2. It is this requirement of fairness that should be at the centre of the arguments before the House and not some other requirement. 3. The appellants' argument falls into the error of attempting to substitute a requirement for an oral hearing for the overall requirement of fairness; this attempted substitution is both artificial and incorrect. Such a requirement for an oral hearing does not exist; it is H

A a requirement that *never* was, for three reasons: (i) there was no requirement for an oral hearing made by statute; (ii) there was no requirement for an oral hearing made by natural justice; (iii) there was no requirement for an oral hearing made by the appellants. 4. The requirement of fairness does not avail the appellants unless they can show prejudice ("something of substance which has been lost": *per* Lord Wilberforce in *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578, B 1595), which they cannot succeed in doing. 5. The decision not to seek an oral hearing was an election made by the appellants after due consideration before ever making their representations. 6. The belief that they had a right in law to an oral hearing was never asserted in evidence by them, nor was such a right claimed by counsel on their behalf until after the Divisional Court hearing.

C As to curability (the auditor's alternative submission if it should be held that the appellants should have had the offer of an oral hearing), Woolf L.J. correctly analysed the framework provided by the statute in his judgment. Section 20 provides one entire process relating to the certification of persons for losses caused by their wilful misconduct. By making provision for a full rehearing on appeal, Parliament has provided the means by which any want of law, evidence or procedure D before the auditor may be remedied (see also *per* Lawton L.J., ante, pp. 645G—646E).

The correct approach in a case such as this is established by the reasoning of the High Court of Australia (*Twist v. Randwick Municipal Council* (1976) 12 A.L.R. 379) and that of the Supreme Court of Canada (*King v. University of Saskatchewan* (1969) 6 D.L.R. (3d) 120) E and the New Zealand Court of Appeal (*Reid v. Rowley* [1977] 2 N.Z.L.R. 472), which was approved by the opinion of the Privy Council given by Lord Wilberforce in *Calvin v. Carr* [1980] A.C. 574, to the effect that a full rehearing of a matter on appeal can enable the court to conclude that at the end of the day no injustice or unfairness has resulted to the complainant. This approach is to be preferred to that of Megarry J. in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 F to the effect that in general a right to appeal can never cure a breach of the rules of natural justice.

Section 20 of the Act of 1982 and the principles of fairness at common law have created a two-stage process: first before the auditor and second the appeal to the High Court. It is therefore necessary to look at the nature of the appeal to the High Court. There is sufficient G scope and flexibility in the High Court for the receipt of new evidence and the presentation of fresh argument to cure any deficiency in either respect before the auditor.

There is a rehearing in the High Court of the entire matter de novo, except only that the court has a copy of the auditor's reasons. The appellant has to start, but the onus must be on the auditor to establish what he has alleged. It is a high onus. The degree of probability needed H is proportionate to the subject matter or commensurate with the occasion. [Reference was made to *Colton v. District Auditor for Wembley Borough Council* (1962) 60 L.G.R. 247.] The "fair crack of the whip" principle (*Fairmount Investments Ltd. v. Secretary of State for the*

Environment [1976] 1 W.L.R. 1255, 1265–1266, *per* Lord Russell of Killowen) requires a due degree of flexibility. As to curability, the appellate court has to look at what happened before the auditor and what has happened on appeal in the context of (i) what Parliament has provided for in section 20 and (ii) what the courts require under common law considerations of fairness.

There are not two conflicting streams of law on curability: the *Denton v. Auckland City* [1969] N.Z.L.R. 256 and *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 stream on the one hand and the *Calvin v. Carr* [1980] A.C. 574 stream on the other. There is only one; the right approach is that in *Calvin v. Carr.* The principle, in short, is that an unrestricted appeal by hearing de novo can cure a procedural defect at first instance, including a breach of natural justice. [Reference was made to *King v. University of Saskatchewan,* 6 D.L.R. (3d) 120; *Twist v. Randwick Municipal Council,* 136 C.L.R. 106; *Reid v. Rowley* [1977] 2 N.Z.L.R. 472; *Love v. Porirua City Council* [1984] 2 N.Z.L.R. 308; *Reg. v. Secretary of State for Transport, Ex parte Gwent City Council* [1987] 2 W.L.R. 961 (the general principle stated there is correct); *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582; *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578 and *George v. Secretary of State for the Environment* (1979) 38 P. & C.R. 609.]

As to whether the Divisional Court was entitled in law to make the finding on the evidence before it that the appellants had been guilty of wilful misconduct as certified by the auditor, and, if it was, whether it was entitled as a matter of law on the evidence before it to find that such conduct had caused a loss to the council, in order to find them guilty of misconduct it was necessary to find, first, that they had been causing the council to act unlawfully, secondly, that they had either known that the same was unlawful or had been recklessly indifferent as to whether it was unlawful or not (see *per* Webster J. in *Graham v. Teesdale,* 81 L.G.R. 117). There is a clear duty imposed on councillors to ensure that arrangements are made for the proper administration of the council's financial affairs (section 151 of the Act of 1972), to make an estimate of anticipated expenditure for the year in question and to balance that against the estimate of income anticipated during the year to meet that expenditure (section 2(1) of the Act of 1967). They, as the council, owe a fiduciary duty to their ratepayers (*Roberts v. Hopwood* [1925] A.C. 578). Local authority finance, particularly in respect of revenue, is of an annual character (*In re Westminster City Council* [1986] A.C. 668). The Act of 1967 contains no express provision fixing the date by which a rate must be made for a given financial year. Nevertheless, in the context of the above duties and the invariable practice of local authorities to make the rate for the beginning of the financial year the law was always understood to be that the rate should be made in time for the commencement of the year in question. That understanding was confirmed by the judgment of Woolf J. in *Reg. v. Hackney London Borough Council, Ex parte Fleming* [1986] 26 R.V.R. 182 that in the absence of a reasonable explanation it was a breach of duty not to have made a rate by the beginning of the financial year or within a reasonable time thereafter. No such reason existed here.

A It is common ground between the parties that *Graham v. Teesdale* and the *Hackney* case were correctly decided and that the Divisional Court had applied the correct test in law to the question whether the appellants were guilty of wilful misconduct. The conclusion as to whether or not they were guilty was a conclusion of fact not susceptible to review on appeal unless it be established that no reasonable tribunal properly directed could have come to such a conclusion on the evidence before B it. The only conclusion that could reasonably be reached on the evidence was that the appellants delayed in making a rate in 1985 in order to use that delay as a weapon to try to force central government to increase the funding of the council's expenditure. Such a weapon entails as an essential element the fact that the appellants were prepared to see the city thrown into financial and administrative chaos to achieve their ends. C Such a reason for delay in making a rate was manifestly improper and contrary to law.

As appears from the judgment of Lawton L.J. in the Court of Appeal and Glidewell L.J. in the Divisional Court, there was abundant evidence from which the Divisional Court and the auditor could reach the conclusion that the conduct of the appellants was wilful in the sense that they knew it to be wrong and contrary to law. That conclusion was D further supported by the subsequent conduct of the appellants in that they voted against the making of a lawful rate on 14 June 1985, approved a deficit budget and an unlawful rate in the face of advice from the city solicitor that to do so was unlawful and subsequently issued redundancy notices to the council's employees as a consequence of this campaign against central government.

E As to loss, for the purposes of this stage of the extraordinary audit the auditor restricted his certificate to ascertaining the amount of the loss resulting to the council by 24 June 1985 from the non-payment in the financial year 1985–86 by the Treasury Valuer of payments made by convention in lieu of rates for property occupied by the Crown and the non-payment of the rate rebate element of housing benefit by the Department of Health and Social Security under the provisions of the F Social Security and Housing Benefits Act 1982. Both payments fall to be made either in respect of or in lieu of the rate levied in the current year. In the absence of a rate for the year there was no obligation either on the D.H.S.S. under the Act or the Crown under the convention to make those payments. The D.H.S.S. and the Secretary of State for the Environment had given clear and explicit warning early in 1985 that rate G rebate payments would not be made if a rate was not made. The Crown had withheld payments in lieu of rates during the period that the council delayed after the commencement of the financial year 1984–85 to make a rate. The Secretary of State and the Treasury Valuer had given similar warnings with respect to those payments early in 1985. Non-payment of those sums was a direct consequence of the appellants' conduct in failing to make a rate at the beginning of the financial year.

H No new facts were found by the auditor: see *per* Glidewell L.J. [1986] R.V.R. 45, 58. The proper approach to the new documents is that of Woolf L.J. (ante, p. 671D). The proper approach is to look at the whole of the proceedings, before the auditor and before the

Environment [1976] 1 W.L.R. 1255, 1265–1266, *per* Lord Russell of Killowen) requires a due degree of flexibility. As to curability, the appellate court has to look at what happened before the auditor and what has happened on appeal in the context of (i) what Parliament has provided for in section 20 and (ii) what the courts require under common law considerations of fairness.

There are not two conflicting streams of law on curability: the *Denton v. Auckland City* [1969] N.Z.L.R. 256 and *Leary v. National Union of Vehicle Builders* [1971] Ch. 34 stream on the one hand and the *Calvin v. Carr* [1980] A.C. 574 stream on the other. There is only one; the right approach is that in *Calvin v. Carr*. The principle, in short, is that an unrestricted appeal by hearing de novo can cure a procedural defect at first instance, including a breach of natural justice. [Reference was made to *King v. University of Saskatchewan,* 6 D.L.R. (3d) 120; *Twist v. Randwick Municipal Council,* 136 C.L.R. 106; *Reid v. Rowley* [1977] 2 N.Z.L.R. 472; *Love v. Porirua City Council* [1984] 2 N.Z.L.R. 308; *Reg. v. Secretary of State for Transport, Ex parte Gwent City Council* [1987] 2 W.L.R. 961 (the general principle stated there is correct); *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582; *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578 and *George v. Secretary of State for the Environment* (1979) 38 P. & C.R. 609.]

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Divisional Court, to see whether the appellant councillors had a "fair crack of the whip," etc.

As to the numbers of applicants, see *Rothnie v. Dearne Urban District Council* (1951) 50 L.G.R. 123.

Blom-Cooper Q.C. in reply. The appellant councillors put it in two ways: (1) if section 20(3) encompasses a judicial review function, the Divisional Court would have quashed the certificate if it had had the benefit of what the Court of Appeal said: see *per* Glidewell L.J., Caulfield J. and Dillon L.J.; (2) (an alternative argument) the fact that the Divisional Court dealt with the merits should not deprive the councillors of the result of the procedural irregularity. R.S.C., Ord. 55, r. 1, provides an appeal by way of rehearing, not a hearing afresh: see *Builders Licensing Board (N.S.W.) v. Sperway Constructions (Sydney) Pty. Ltd.* (1976) 51 A.L.J.R. 260 and *Tyrer v. Middleton* (unreported), 5 December 1973 (see *Jones, Local Government Audit Law,* 2nd ed., p. 265; App. D.7, p. 357; 230 E.G. 973). The court cannot have a fresh oral hearing; it has no jurisdiction to do so. The kind of hearing that it can have does not cure a breach of natural justice by the auditor.

As to *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582; *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578; *George v. Secretary of State for the Environment,* 38 P. & C.R. 609, etc., see *per* Woolf L.J. (ante, p. 669F). First, the partial exercise conducted by the House of Lords is wholly unsatisfactory to determine whether the appellant councillors should have had an oral hearing at some stage. Secondly, the Court of Appeal went through the whole of the documentation and affidavits. It was in a very good position to make its finding as to whether there had been any unfairness in the auditor's procedure: see *per* Lawton L.J. (ante, p. 644F–G), Dillon L.J. (ante, pp. 651H—652A) and Woolf L.J. (ante, p. 670C). If the Divisional Court and the Court of Appeal were entitled to look at the new material and form their conclusions on the whole material before them the appellant councillors cannot impugn their decision, but they were not entitled to rely on those materials in the absence of an oral hearing.

Charles Cross for the council addressed the House with regard to costs.

Their Lordships took time for consideration.

12 March. Lord Keith of Kinkel. My Lords, the appellants are a group of Liverpool city councillors. The respondent is the district auditor for the city. In respect of the financial year beginning 1 April 1985 the appellants brought it about that a rate for the city was not set until 14 June 1985. The council were advised by their officers that the rate then proposed to be set was an illegal one, in respect that it fell far short, taken along with other sources of income, of meeting the city's expenditure for the year as then estimated. But that is not the point. The point is that the delay in setting the rate led to delay in receiving various items of income, including government contributions in respect of payments in lieu of rates on Crown properties and in respect of rate rebates.

There had been trouble over the making of a rate also in respect of the financial year 1984–85, when in the event a rate was made on 10 July 1984. On 19 March 1984 the district auditor's predecessor had sent to the council a report expressing concern at indications that the council might deliberately make a rate for the year which would not be sufficient to meet its outgoings for that year. The report drew attention to possible consequences to individual councillors, both financial and by way of disqualification, if an adequate rate were not made. In the penultimate paragraph it was stated: "Members would in my view also be at risk if a rate was not made because no vote was taken or there was unreasonable delay in making a rate."

On 10 April 1985 the district auditor's predecessor had sent to the council a report expressing concern at the council's failure to make a valid rate for the year commencing 1 April 1985, drawing attention to his report dated 19 March 1984 and reiterating the duties of councillors and the possible consequences to the city and to individual councillors if these duties were not carried out. The report concluded by urging the council in its own best interests, as well as those of individual members, employees and the local community, that a rate should be made at a very early date. On 7 May 1985 the policy and finance committee of the council rejected a motion that the chairman of the committee submit proposals to the next meeting of the council to enable it to fix a rate, and this was approved at a meeting of the council on 21 May.

On 21 May 1985 the district auditor had made a further report to the council, copies of which he sent to all councillors. In it he referred to earlier reports and gave notice that unless the council made a lawful rate at the earliest opportunity and in any event before the end of May he would forthwith commence action under section 20 of the Local Government Finance Act 1982 to recover any losses occasioned by the failure to make a rate from the members responsible for incurring them.

On 6 June 1985 the Audit Commission directed that an extraordinary audit be carried out. On 26 June 1985 the district auditor sent to each of the appellants a notice stating that he had to consider in pursuance of his duty under the Act of 1982 whether he should certify the sum of £106,103, or any other sum, consequent on the failure to make a rate or the delay in making a rate for the financial year 1985–86, as due from the appellants on the ground that a loss of such sum had been incurred or deficiency caused by the appellants' wilful misconduct. The appellants were further notified that they might make representations in writing to the district auditor before he reached a decision, and that any such representations should reach him by 19 July 1985. There was enclosed with the notice a note of the matters to which the district auditor had had regard in deciding to issue it. This note set out the council's duty under section 2(1) of the General Rate Act 1967 to make a rate, and the district auditor's responsibility under section 20(1) of the Act of 1982 which provides:

> "Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—. . . (*b*) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that . . . the amount of the loss or the

14 of the Act of 1982 and approved by resolution of both Houses of Parliament. The code, by paragraphs 16 to 20, contemplates that an oral hearing will be held where the auditor is dealing with a notice of objection given under section 17(3) of the Act of 1982, which itself refers to the objector attending before the auditor. The code does not deal with the procedure to be followed where the auditor takes action under section 20(1). Counsel produced a list of all instances since 1972 where a district auditor had occasion to consider an issue of wilful misconduct, indicating that in all but one of them an oral hearing had been offered. This had the effect, so it was maintained, of creating a legitimate expectation on the part of the appellants that they would be offered an oral hearing before the district auditor arrived at his decision.

My Lords, if the district auditor had reached a decision adverse to the appellants without giving them any opportunity at all of making representations to him, there can be no doubt that his procedure would have been contrary to the rules of natural justice and that, subject to the question whether the defect was capable of being cured on appeal to the Divisional Court, the decision would fall to be quashed. In the event, written representations alone were asked for. These were duly furnished, in very considerable detail, and an oral hearing was not requested, though that could very easily have been done, and there is no reason to suppose that the request would not have been granted. None of the appellants stated, in his or her affidavit before the Divisional Court, that they had an expectation that an oral hearing, though not asked for, would be offered. The true question is whether the district auditor acted fairly in all the circumstances. It is easy to envisage cases where an oral hearing would clearly be essential in the interests of fairness, for example where an objector states that he has personal knowledge of some facts indicative of wilful misconduct on the part of a councillor. In that situation justice would demand that the councillor be given an opportunity to depone to his own version of the facts. In the present case the district auditor had arrived at his provisional view upon the basis of the contents of documents, minutes of meetings and reports submitted to the council from the auditor's department and their own officers. All these documents were appended to or referred to in the notice of 26 June sent by the district auditor to the appellants. Their response referred to other documents, which were duly considered by the district auditor, as is shown by his statement of reasons dated 6 September 1985. No facts contradictory of or supplementary to the contents of the documents were or are relied on by either side. If the appellants had attended an oral hearing they would no doubt have reiterated the sincerity of their motives from the point of view of advancing the interests of the inhabitants of Liverpool. It seems unlikely, having regard to the position adopted by their counsel on this matter before the Divisional Court, that they would have been willing to reveal or answer questions about the proceedings of their political caucus. The sincerity of the appellants' motives is not something capable of justifying or excusing failure to carry out a statutory duty, or of making reasonable what is otherwise an unreasonable delay in carrying out such a duty. In all the circumstances I am of opinion that the district auditor did not act

A unfairly, and that the procedure which he followed did not involve any prejudice to the appellants.

It is to be added that counsel for the appellants founded upon certain matters which it was maintained were relied upon by the district auditor in his statement of reasons dated 6 September 1985 without having been included in the notice of 26 June 1985 so as to give the appellants the opportunity of dealing with those matters. In my opinion there is no B merit in this point. One of the matters, the alleged unlawfulness of the rate made on 14 June 1985, was not founded on by the district auditor as a ground for issuing his certificate. The statement of reasons does not assert that the rate was unlawful. It does no more than mention that, as was the fact, the city solicitor had advised the council that the proposed rate would be unlawful. The substance of the other matters was broadly C covered in the statement which accompanied the notice of 26 June 1985.

Upon the view which I take, that the district auditor's decision was not vitiated by procedural unfairness, the question whether such unfairness, had it existed, was capable of being cured by the appeal to the High Court does not arise directly for decision. It is, however, my opinion that the particular appeal mechanism provided for by section 20(3) of the Act of 1982, considered in its context, is apt to enable the D court, notwithstanding that it finds some procedural defect in the conduct of an audit which has resulted in a certificate based on wilful misconduct, to inquire into the merits of the case and arrive at its own decision thereon. Section 20(3)(*b*) empowers the court to "confirm the decision or quash it and give any certificate which the auditor could have given." The relevant rules of court enable a rehearing of the broadest possible E scope to take place. Evidence may be given on oath, which is not possible before the auditor, and there is no limit to the further material which may be introduced so as to enable the whole merits to be fully examined. There is no question of the court being confined to a review of the evidence which was available to the auditor. In the circumstances, it would be quite unreasonable and not in accordance with the intendment of the enactment to hold that the court, where an issue is F raised as to the fairness of the procedure adopted by the auditor, is confined to a judicial review species of jurisdiction so as to have power only to quash or affirm the auditor's certificate without entering upon its own examination of the merits of the case. No doubt there may be cases where the procedural defect is so gross, and the prejudice suffered by the appellant so extreme, that it would be appropriate to quash the G auditor's decision on that ground. But in my opinion the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course. I may add that I agree entirely with all that is said upon this aspect of the appeal in the speech of my noble and learned friend Lord Bridge of Harwich.

The final argument for the appellants was that the loss of £106,103 was not shown to have been caused by the wilful misconduct of the H appellants. This argument was fully considered and rejected by the Divisional Court and the Court of Appeal. I agree entirely with their reasons for rejecting that argument, to which I find it unnecessary to add.

My Lords, for these reasons I would dismiss the appeal. The appellants must pay the district auditor's costs, subject to any protection available to those of them who hold legal aid certificates. This is a suitable case for directing, under section 20(3) of the Act of 1982, that any unrecovered costs shall not be paid by the City of Liverpool.

Lord Bridge of Harwich. My Lords, on 6 June 1985 the Audit Commission exercised its power under section 22(1)(*b*) of the Local Government Finance Act 1982 to order an extraordinary audit of the accounts of the Liverpool City Council for the financial year which commenced on 1 April 1985 in so far as they related to the failure to make a rate or the delay in making a rate for that financial year. By notice dated 26 June 1985 the respondent district auditor informed each of the present appellants, who were members of the majority party on the Liverpool City Council, of the extraordinary audit and that he intended to consider in pursuance of his duty under section 20(1) of the Act of 1982 whether he should certify the sum of £106,103 or any other sum, consequent upon the failure to make a rate or the delay in making a rate for the financial year commencing on 1 April 1985, as due from him or her on the ground that a loss of such sum had been incurred or a deficiency caused by his or her wilful misconduct. The notice was accompanied by a note referring to the relevant statutory provisions, summarising the history, enclosing a number of reports made to the council by the district auditor and his predecessor, and identifying all relevant minutes of the council and its committees and reports made to the council by the council's own officers. The note indicated that this was the material to which the district auditor had had regard and continued as follows:

> "5. The facts show that there was no lawful justification for the delay in the making of the rate. The council has thus disregarded the advice and warnings given by me, my predecessor and its officers. On the evidence the council would appear to be in breach of its statutory duty. 6. To the extent that a breach of statutory duty results from a deliberate failure by any member to discharge his or her own duty then such a member is guilty of wilful misconduct. My predecessor referred to the members' duty in his reports of 19 March 1984 and 10 April 1985."

The note then proceeds to indicate how the district auditor had assessed such losses or deficiencies as he could then identify as caused by the delay in making a rate and concludes:

> "11. I have reviewed the resolutions of the council to determine how individual members discharged their duty. It at present seems to me that members listed below by their voting, abstention from voting or absence may have failed to discharge their duty as members and may therefore be guilty of wilful misconduct occasioning the loss or deficiency identified in paragraph 9 above. But I will defer making any decision until I have had the opportunity to consider any representations in writing you may wish to make."

A The formal notice indicated that representations in writing should be made not later than 19 July 1985.

On 19 July the leader of the city council, Councillor Hamilton, wrote to the district auditor in the following terms:

> "The Liverpool Labour Group have held several meetings to discuss their response to your letter of 26 June 1985 regarding the audit of
B Liverpool City Council's accounts 1985–86. It is the unanimous view of those concerned that our response to you should be a collective one and accordingly the Labour Group's response is attached and signed by those councillors who are in receipt of your letter of 26 June. I would, however, wish to point out, that in the case of Councillor James Hackett, he has been away on holiday for the last three weeks and has not had the opportunity to sign the documents.
C It would therefore be appreciated if you would allow Councillor Hackett to reply to you upon his return."

On his return from holiday a few days later Councillor Hackett adopted the response of his fellow councillors.

The response enclosed with Councillor Hamilton's letter was a carefully drafted and closely reasoned document of 30 pages accompanied
D by 349 pages of appendices. A paragraph headed "Conclusion" contained the following:

> "In preparing this response, and in assembling the accompanying material, the councillors have sought to comply with the relatively short time allowed in the district auditor's notice. They would wish, however, to reserve the right to add to or develop their response, as
E appropriate, in the light of events."

Concurrently with the extraordinary audit of the accounts of Liverpool City Council a similar extraordinary audit had been ordered of the accounts of the Lambeth London Borough Council. In the course of that audit a notice similar to the notice dated 26 June 1985 in the Liverpool case had been sent to the Lambeth councillors and they too
F had made a collective response. On 7 August 1985 Councillor Hamilton wrote again to the district auditor saying:

> "The Liverpool councillors would wish, as part of their response to the notices issued to them and in exercise of the right reserved therein, to associate themselves with the legal submissions made by the Lambeth councillors in so far as they have not been explicitly
G covered in their own response."

No individual Liverpool councillor submitted any separate written representations on his own behalf or asked for the opportunity to make representations orally.

On 6 September 1985 the district auditor issued his certificate pursuant to section 20(1)(*b*) of the Act of 1982 that £106,103 was due
H from each of the appellant councillors on the ground that it appeared to him that a loss or deficiency in that amount had been caused by their wilful misconduct, accompanied by a statement in writing of the reasons for his decision to issue the certificate. The appellant councillors all

appealed against the decision under section 20(3)(*a*). A decision to issue a similar certificate in respect of a number of Lambeth councillors was also under appeal. The appeals were heard together by the Divisional Court (Glidewell L.J., Caulfield and Russell JJ.) over 10 sitting days from 3 to 14 February 1986. As in the written representations to the district auditor, so on the hearing of the appeals the stance adopted by the Liverpool appellants was a united and collective one. They were all represented by the same counsel. Although the affidavit material was voluminous and different appellants deposed in their affidavits to different detailed aspects of the facts, all expressed their agreement with the main affidavit made by Councillor Hamilton, the leader of the council, and neither by affidavit nor through counsel did any individual appellant invite the court to distinguish his responsibility for what the majority group on the city council had done or failed to do from that of any other member of the group.

The main issue canvassed in the Divisional Court was the issue on the merits whether the appellants had been guilty of wilful misconduct and if so whether it had caused any loss. The court took the view urged by counsel for the district auditor and supported by counsel for the Lambeth councillors that, in relation to that issue, the scope of the hearing on appeal was unlimited and that they could consider whatever evidence and arguments were put before them, whether or not they had been before the respective auditors. At an early stage in the hearing, the court raised the question whether any party wished to give oral evidence. None did. Counsel then appearing for the present appellants went further and submitted that it would be inappropriate for the court to hear oral evidence. When invited by the court to disclose when and in what circumstances the rate at a figure representing a 9 per cent. increase over the 1984 rate (which the Liverpool City Council had eventually adopted and which would have left a deficit of £117 million on estimated expenditure) had been decided upon by the appellants, he submitted that the court was not entitled to investigate the activities of a political caucus. As Glidewell L.J. put it:

> "It is clear to me, therefore, that the highly experienced counsel who appeared for the appellants were satisfied that justice could be done by our hearing their clients' appeals on affidavit and documentary evidence."

The judgments in the Divisional Court examined the issue on the merits at length and concluded that wilful misconduct causing the loss certified by the district auditor was fully established.

Submissions that the district auditors' certificates against both Liverpool and Lambeth councillors were vitiated by procedural unfairness, in that the councillors had not had a proper opportunity to answer some of the points relied on in the reasons for the respective decisions to certify, were made by counsel for both the Liverpool and the Lambeth appellants after their submissions on the merits. The court took the view that these should have been taken as preliminary points and, if well founded, would lead to the quashing of the auditors' decisions. But they concluded that there had been no procedural unfairness and that the

appellants had had a sufficient opportunity to meet the case put against them. The Divisional Court gave judgment dismissing the appellants' appeals on 5 March 1985.

The Liverpool councillors appealed. The Lambeth councillors did not. In the Court of Appeal there was both a change of counsel and a change of emphasis. Mr. Louis Blom-Cooper now presented the case for the Liverpool appellants, as he has done before your Lordships. The hearing occupied the court for nine days from 9 to 22 July 1986. The merits were once more fully canvassed and the Court of Appeal (Lawton, Dillon and Woolf L.JJ.) unanimously affirmed the view of the Divisional Court that the appellants had been guilty of wilful misconduct causing the certified loss. But my impression is that the procedural complaint by which the decision of the district auditor was sought to be impugned loomed much larger in the Court of Appeal than it had in the Divisional Court. Mr. Blom-Cooper introduced elaborate new arguments based on the history of the legislation relating to the auditing of local government accounts from the Poor Law Amendment Act 1844 to the Local Government Finance Act 1982 and on the practice followed by district auditors over a long period to support a submission, repeated before your Lordships, that a district auditor, before certifying that a loss or deficiency has been caused by the wilful misconduct of any person under section 20(1)(*b*) of the Act of 1982, is obliged, as a matter of law, to offer that person an oral hearing and that, if he does not do so, any certificate issued is a nullity. The Court of Appeal unanimously rejected this submission. They expressed marginally different views, however, on the complaint that there had been a lack of fairness in the proceedings. Put shortly, Lawton L.J. thought that, in so far as the district auditor's reasons for his decision impugned the good faith and credibility of the appellants' response to his notice of 26 June 1985, he ought, before taking the decision, to have given them the opportunity of addressing him orally on that issue. Dillon L.J. inclined to the same view, though he found it unnecessary to reach a final conclusion. Both based their decision on the ground that the full hearing on the merits before the Divisional Court could, as a matter of law, and did, as a matter of fact, remove any ground of complaint arising out of the procedure followed by the district auditor in reaching his decision. Woolf L.J. approached the matter more broadly. He went no further than to say that it would be preferable to have invited representations as to whether there should be an oral hearing. But he concluded that when the proceedings, including the hearing before the Divisional Court, were considered as a whole, the allegation of unfairness was not made out. The Court of Appeal gave judgment dismissing the appeals on 31 July 1986 but granted leave to appeal to your Lordships' House.

My Lords, it is appropriate to emphasise at the outset that the conclusion reached by the district auditor, the Divisional Court and the Court of Appeal that the appellants were guilty of wilful misconduct causing the certified loss is no longer the subject of any substantial challenge. I use the qualifying epithet "substantial" for two reasons. First, Mr. Blom-Cooper renewed shortly before your Lordships a submission made below to the effect that, if there was wilful misconduct,

it did not cause the relevant loss which the district auditor certified. The point is shortly dealt with in the judgments of Glidewell L.J. in the Divisional Court and Lawton and Woolf L.JJ. in the Court of Appeal. They demonstrate clearly that, if there was misconduct, the certified loss was caused by it. I need say no more than that I agree with and adopt their reasons. Secondly, the document headed "The Issues on the Appeal" which Mr. Blom-Cooper helpfully handed in at the opening of his submissions contains a paragraph which reads:

> "Did the district auditor and the courts below, in concluding that the appellants were guilty of wilful misconduct in delaying the making of the rate for the financial year 1985–86, apply the right test in judging the decisions and actions of the appellants?"

Whatever faint argument, in the course of Mr. Blom-Cooper's oral submissions, may have been addressed to this issue, it signally failed to identify any misdirection in law by the courts below in their consideration of the issue of wilful misconduct. It seems to me abundantly clear that they applied the right test and the question whether they came to the right conclusion is one not of law but of fact. Your Lordships were never invited by Mr. Blom-Cooper to examine the voluminous material in the affidavits and exhibits on which any challenge to the finding of wilful misconduct must depend and the fact of wilful misconduct, therefore, must be accepted as established.

The only challenge which must now be considered is procedural. There are, I think, three facets to the challenge. First, it is said that, as a matter of law, there is an absolute obligation on a district auditor, before issuing a certificate under section 20(1) of the Act of 1982, to ask any person upon whom the certificate will impose a liability whether he wishes to make oral representations. Secondly, in the circumstances of this case, it is said that there were matters of complaint against the appellants relied on by the district auditor in his reasons for decision dated 6 September 1985 of which the appellants were not informed by, and which they could not have anticipated from, the terms of the notice given to them dated 26 June 1985. Thirdly, it is said that, apart from any general obligation to offer the appellants an oral hearing, the district auditor was under a particular obligation to do so before he could properly reject as unacceptable any explanation of their conduct put forward by the appellants relating to their intention, motivation, or good faith. If any one of these three propositions is established, then it is submitted that there was such a want of natural justice in the proceedings leading to the decision of the district auditor as to invalidate the certificate, with the result that, on appeal, the Divisional Court, irrespective of its view on the merits, was obliged to quash it.

My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established

that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. It follows that the starting-point for the examination of all the appellants' submissions on this aspect of the case is the Act of 1982. It will be convenient here to set out all the provisions which, in my opinion, throw light on the issues to be decided. They are as follows:

> "17(1) At each audit by an auditor under this Part of this Act any persons interested may inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them and make copies of all or any part of the accounts and those other documents. (2) At the request of a local government elector for any area to which those accounts relate, the auditor shall give the elector, or any representative of his, an opportunity to question the auditor about the accounts. (3) Subject to subsection (4) below, any local government elector for any area to which those accounts relate, or any representative of his, may attend before the auditor and make objections—(*a*) as to any matter in respect of which the auditor could take action under section 19 or 20 below; . . . (4) No objection may be made under subsection (3) above by or on behalf of a local government elector unless the auditor has previously received written notice of the proposed objection and of the grounds on which it is to be made. . . .
>
> "19(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act that any item of account is contrary to law he may apply to the court for a declaration that the item is contrary to law except where it is sanctioned by the Secretary of State. (2) On an application under this section the court may make or refuse to make the declaration asked for, and where the court makes that declaration, then, subject to subsection (3) below, it may also—(*a*) order that any person responsible for incurring or authorising any expenditure declared unlawful shall repay it in whole or in part to the body in question and, where two or more persons are found to be responsible, that they shall be jointly and severally liable to repay it as aforesaid; (*b*) if any such expenditure exceeds £2,000 and the person responsible for incurring or authorising it is, or was at the time of his conduct in question, a member of a local authority, order him to be disqualified for being a member of a local authority for a specified period; and (*c*) order rectification of the accounts. (3) The court shall not make an order under subsection (2)(*a*) or (*b*) above if the court is satisfied that the person responsible for incurring or authorising any such expenditure acted reasonably or in the belief that the expenditure was authorised by law, and in any other case shall have regard to all the circumstances, including that person's means and ability to repay that expenditure or any part of it. (4) Any person who has made an objection under section 17(3)(*a*) above and is aggrieved by a decision of an auditor not to apply for a declaration under this

section may—(*a*) not later than six weeks after he has been notified of the decision, require the auditor to state in writing the reasons for his decision; and (*b*) appeal against the decision to the court, and on any such appeal the court shall have the like powers in relation to the item of account to which the objection relates as if the auditor had applied for the declaration. . . . (6) The court having jurisdiction for the purposes of this section shall be the High Court except that, if the amount of the item of account alleged to be contrary to law does not exceed the amount over which county courts have jurisdiction in actions founded on contract, the county court shall have concurrent jurisdiction with the High Court. . . .

"20(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—(*a*) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (*b*) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount. (2) Any person who—(*a*) has made an objection under section 17(3)(*a*) above and is aggrieved by a decision of an auditor not to certify under this section that a sum or amount is due from another person; or (*b*) is aggrieved by a decision of an auditor to certify under this section that a sum or amount is due from him, may not later than six weeks after he has been notified of the decision require the auditor to state in writing the reasons for his decision. (3) Any such person who is aggrieved by such a decision may appeal against the decision to the court and—(*a*) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (*b*) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this section as if it had been given by the auditor under subsection (1) above. (4) If a certificate under this section relates to a loss or deficiency caused by the wilful misconduct of a person who is, or was at the time of such misconduct, a member of a local authority and the amount certified to be due from him exceeds £2,000, that person shall be disqualified for being a member of a local authority for the period of five years beginning on the ordinary date on which the period allowed for bringing an appeal against a decision to give the certificate expires or, if such an appeal is brought, the date on

which the appeal is finally disposed of or abandoned or fails for non-prosecution. (5) A sum or other amount certified under this section to be due from any person shall be payable within 14 days after the date of the issue of the certificate or, if an appeal is brought, within 14 days after the appeal is finally disposed of or abandoned or fails for non-prosecution. (6) In any proceedings for the recovery of any sum or amount due from any person under this section a certificate signed by an auditor appointed by the commission stating that that sum or amount is due from a person specified in the certificate to a body so specified shall be conclusive evidence of that fact; and any certificate purporting to be so signed shall be taken to have been so signed unless the contrary is proved. . . . (9) The court having jurisdiction for the purposes of this section shall be the High Court except that, if the sum or amount alleged to be due does not exceed the amount over which county courts have jurisdiction in actions founded on contract, the county court shall have concurrent jurisdiction with the High Court."

All these provisions except section 17(1) and (2) apply to an extraordinary audit under section 22 as they apply to an ordinary audit.

I draw attention at the outset to two striking features of this statutory machinery. The first is that both the exercise of the power to declare items of account unlawful under section 19 and the ultimate power to control the issue of certificates under section 20 are entrusted to the regular courts, the county court if the amount in issue is within the county court's contractual jurisdiction, the High Court if it is not. Under section 19 the auditor can take no effective step without invoking the jurisdiction of the court. Under section 20 the auditor's certificate will be effective unless appealed against. The second striking feature is this. The auditor may act of his own motion either in applying to the court for a declaration under section 19 or in issuing a certificate under section 20. But where, for any reason, he fails or declines to act under either section, after he has been invited to do so by a local government elector exercising his right of objection under section 17(3)(*a*), that elector has an unfettered right to invoke the jurisdiction of the court himself. In a case under section 19 the court will in every case be exercising its jurisdiction at first instance, but the auditor may be either seeking or opposing the declaration. In a case under section 20, the auditor may, if he has been invited to act under section 17(3)(*a*), be described as the tribunal of first instance, but whichever way he decides, an unfettered right of appeal to the courts lies at the instance either of the aggrieved elector or of the party from whom the relevant loss has been certified to be due. In either case if the court falls into error the error can be corrected by the Court of Appeal or, if necessary, by your Lordships' House.

So far as procedure is concerned, section 14 of the Act of 1982 provides for the issue of a code of audit practice to be approved by each House of Parliament. The code currently in force contains detailed provisions relating to objections under section 17, but none relating to

the procedure to be followed when an auditor contemplates the issue of a certificate under section 20 of his own motion. The gravity of the consequences of a certificate for the person from whom the amount of a loss is certified to be due, particularly if he is a member of a local authority and the amount exceeds £2,000, are obvious enough. No one doubts that the auditor must give to such a person adequate notice of the case against him and an adequate opportunity to present to the auditor his defence to that case. I followed with interest Mr. Blom-Cooper's carefully researched review of the history of local government audit legislation, but I did not find that it threw any light on what, in particular, is required to provide such an opportunity in the circumstances of any particular case under the statute presently in force. Still less do I attach any significance to the fact that since 1972, when provisions substantially to the like effect as those which we find in the Act of 1982 first reached the statute book, auditors have, as a matter of practice, always invited oral representations from members of local authorities before certifying the amount of any loss or deficiency as due from them. When a single individual is thought to have failed to bring a sum into account or by his wilful misconduct to have caused a loss or deficiency, it is no doubt a very appropriate practice to invite his explanation orally. But I fail to understand how that practice can constrain the courts to construe the statute as requiring an auditor proposing to act under section 20 to invite oral representations as a matter of law in every case. In this case the auditor seems to have intelligently anticipated that the Liverpool councillors who constituted the majority group would want to present a united front in their response to his notice of 26 June 1985 as they had done in their conduct of the city council's affairs during the previous year. Councillor Hamilton's letter of 19 July 1985 amply confirmed his expectation. If any councillor had wanted to put forward his own independent and individual grounds in rebuttal of the charge of wilful misconduct against himself, I have no doubt he would have done so. If any had asked to be heard orally and the auditor had refused, there would have been clear ground for a complaint of unfairness. I suppose it is conceivable that the appellants collectively might have wished to appoint a spokesman to present their case orally rather than in writing, though the case they did present, embracing as it did such a large volume of documentary material, clearly lent itself more aptly to written than oral presentation. It has never been suggested that it was unfair that the auditor did not invite the appellants to address arguments to him through solicitor or counsel. The proposition that it was, per se, in breach of the rules of natural justice not to invite oral representations in this case is quite untenable.

The second facet of the complaint of unfairness alleges that the notice of 26 June 1985 did not sufficiently particularise the case which the appellants had to meet and that new matters were relied on by the auditor in the reasons for his decision given on 6 September 1985. This is exhaustively examined in the judgments of the courts below and it would serve no good purpose to re-examine it in detail. The notice dated 26 June was sent with copies of all the previous reports to the council of the district auditor and his predecessor and identified by

reference all the relevant council and committee minutes and reports made to the council by their own officers. I am fully satisfied that this gave adequate notice of the grounds on which the auditor was provisionally minded to proceed against the appellants under section 20 and indeed the character of the response shows that they were in no doubt as to the nature of the case they had to meet. The point that troubled Lawton L.J. and, to a lesser extent, Dillon L.J. was that the auditor in giving the reasons for his decision rejected the protestations of good faith in the appellants' response to his notice of 26 June and did not accept that their motivation in acting as they did was as they claimed. The relevant passage from the judgment of Lawton L.J. reads, ante, p. 644c–g:

> "What the appellants were saying was wholly inconsistent with what was in these minutes and documents. An example is provided by their assertion that they had acted 'in good faith and after taking advice from their officers.' They had not acted on the advice of their officers in March 1984, and again in April 1985 and on 14 June 1985. Their assertion that they believed until 6 June 1985 that the central government would provide further money was so contrary to the facts that no rational person could have believed anything of the kind. The evidence relied on by the district auditor for rejecting the appellants' assertion that they believed that more money would be forthcoming was strong; but it is a matter of human experience that political zealots, as some of the appellants seem to have been, can so delude themselves about reality that lying is unnecessary for them. The courts are chary, however, about disbelieving people and attributing bad faith to them without an oral hearing: see *In re Smith and Fawcett Ltd.* [1942] Ch. 304, *per* Lord Greene M.R., at p. 308, and *Jeffs v. New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551, *per* Viscount Dilhorne, at p. 568. Had the appellants been given an opportunity of commenting on the adverse opinion of their conduct which the district auditor had formed they, or some of them, might have been able to persuade him of their good faith and credibility. Maybe on the facts of this case they would have had difficulty in so doing; but, in my judgment, they should have been given a chance of doing so. It was unfair not to have given them that chance."

With respect, I cannot agree that the authorities referred to had any relevance to the circumstances of the instant case. There was here no room for dispute as to what the council, for whose action or inaction the appellants were responsible, had done or failed to do. There was no room for dispute as to the factual information and legal advice which had at all material times been available to the appellants. It was never claimed on behalf of the appellants that they acted under any misapprehension. In so far as there was an issue as to whether the course on which the appellants quite deliberately embarked was one in which they acted "in good faith" or as to the motives which underlay their action or inaction, it was in essence a matter for argument rather than for evidence. When a group of 49 people act collectively they may,

of course, have different subjective reasons for acting. But if they assert that their collective action was prompted by a single collective state of mind, this is inevitably to some extent a fiction. A group can have no single subjective mind. On the other hand, the objective state of mind of the group can only be inferred from what the group concurred in doing or omitting to do in given circumstances. In this case it would not have advanced the appellants' case at all if each appellant had appeared in person before the auditor and asserted his sincere belief in what had been said in the collective written response. On the other hand, if each had given his own explanation and volunteered to submit to questioning as to his own individual state of mind in relation to the council's proceedings, this would have been a departure from the collective stance which the appellants had deliberately adopted and to which they have throughout resolutely adhered. For these reasons I think the auditor was fully entitled to draw inferences from the undisputed facts which involved a rejection of the appellants' protestations of good faith and purity of motive and that his doing so without further reference to the appellants after he received their response dated 19 July 1985 involved no unfairness to them.

These conclusions would be sufficient to dispose of the appeals. But I return to the question of more general importance whether, if there had been any unfairness in the procedure followed by the auditor, this would necessarily have led, as the Divisional Court thought, to the quashing of the certificate or whether, as the Court of Appeal concluded, the full hearing of the appeal to the court on the merits was in law able to make good any deficiency in the auditor's procedure. It was in order to set this question in its proper context that I thought it necessary, earlier in this opinion, to set out the relevant statutory provisions in extenso. The question how far in domestic and administrative two-tier adjudicatory systems a procedural failure at the level of the first tier can be remedied at the level of the second tier was considered by the Privy Council in *Calvin v. Carr* [1980] A.C. 574 in which all the relevant previous authorities on the subject are reviewed. I do not find it necessary in this case to examine the general principles there discussed, nor would I think it appropriate in this case to seek to lay down any principles of general application. This is because the question arising in the instant case must be answered by considering the particular statutory provisions here applicable which establish an adjudicatory system in many respects quite unlike any that has come under examination in any of the decided cases to which we were referred. We are concerned with a point of statutory construction and nothing else.

As I have pointed out, the court acts at first instance under section 19 in deciding whether or not to make a declaration and so acts either on the application of the auditor or at the instance of an objector against the auditor's opposition. Under section 20, although the auditor acts at first instance in deciding whether or not to certify, either of his own motion or at the instance of an objector, the jurisdiction of the court may be invoked by a person aggrieved by either an affirmative or a negative decision. Once issued a certificate is valid until it is quashed or varied. This clearly follows from the provisions of section 20(6)

making the certificate conclusive evidence in proceedings for recovery of the certified sum or amount of the loss. Apart from the provisions for appeal in section 20(3) a certificate could, no doubt, be the subject of an application to the High Court for judicial review. But I cannot see any reason why it should be necessary to seek leave to invoke the supervisory jurisdiction of the court when any party aggrieved by the certificate is entitled as of right to invoke the much more ample appellate jurisdiction which the statute confers. It is the very amplitude of the jurisdiction which, to my mind, is all-important. Whether the auditor has decided to certify or not to certify, the court is empowered to confirm or quash the decision, to vary the decision if a certificate has been issued by the auditor, and in any case to give any certificate which the auditor could have given. The language describing the court's powers could not possibly be any wider. Procedurally there is nothing either in the statute or in the relevant rules of court to limit in any way the evidence which may be put before the court on either side. In the light of these considerations I can find no reason whatever to construe the statute in such a way as to limit the discretion of the court as to the action it will take to provide an appropriate remedy where the matter, or one of the matters, of complaint is of unfairness in the procedure followed by the auditor. I can well see that, if the auditor has certified of his own motion without giving any proper notice to the person against whom the certificate operates, the court would probably decide to quash it without entering upon the merits. But if, on the other hand, a local government elector had objected under section 17(3)(*a*) seeking a certificate against a councillor whom he accused of wilful misconduct causing loss and the auditor had improperly dismissed his objection out of hand, it might well be that the most expeditious and appropriate remedy would be for the court, on appeal by the objector, to determine the issue itself. If the court decided to proceed in that way, it would be effectively determining at first instance the issue whether the councillor had been guilty of wilful misconduct causing loss or deficiency. The councillor might, in such circumstances, have heard nothing of the matter until the proceedings before the court, but, if the objector could prove the case against him, the councillor would have no ground of complaint on that score.

In every case it must be for the court, as a matter of discretion, to decide how in all the circumstances its jurisdiction under section 20(3) can best be exercised to meet the justice of the case. But I am clearly of opinion that when the court has, as here, in fact conducted a full hearing on the merits and reached a conclusion that the issue of a certificate was justified, it would be an erroneous exercise of discretion nevertheless to quash the certificate on the ground that, before the matter reached the court, there had been some defect in the procedure followed.

I would dismiss the appeals and make orders for costs as proposed by my noble and learned friend Lord Templeman.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord

Templeman. I agree with all of them, and for the reasons which they give I would dismiss the appeal.

Lord Templeman. My Lords, this appeal is the culmination of a conflict between a local authority and Parliament. In 1985 the will of the local authority, Liverpool City Council, was exercised by the appellants, an united majority of elected councillors. The will of Parliament was exercised by ministers supported by an united majority of elected members of the House of Commons. Liverpool's revenues mainly consisted of grants from national taxes controlled by the ministers and the products of local rates controlled by the councillors. The councillors asked that Liverpool's grants from national taxes be made at a level which the ministers declined to accept. The ministers asked that Liverpool's expenditure be maintained and Liverpool's budget balanced at levels which the councillors declined to accept. The ministers could lawfully make grants from national taxes at the level decided by the ministers with the approval of Parliament. The councillors could not lawfully maintain Liverpool's expenditure at a level which exceeded Liverpool's income derived from grants, rates and other sources of revenue. A local authority is created by Parliament; must perform the duties imposed by Parliament; and can only exercise powers conferred by Parliament in the manner and for the purposes intended by Parliament. If a majority of councillors who control the local authority procure the local authority to reject or neglect its statutory duty, each councillor is guilty of misconduct, even though the councillor may have been democractically elected to oppose the performance of that duty. If a councillor is advised or is otherwise conscious that action contemplated by him will amount to misconduct, he is guilty of wilful misconduct and is liable to statutory penalties if he persists. In the present case the appellants appeal against a finding of wilful misconduct.

By section 2(1) of the General Rate Act 1967:

> "Every rating authority shall . . . make such rates as will be sufficient to provide for such part of the total estimated expenditure to be incurred by the authority during the period in respect of which the rate is made as is not to be met by other means . . ."

By section 1 of the Local Government Finance Act 1982 a rating authority shall not have power "(*b*) to make a rate for any period other than a financial year," and by section 7(1) of the same Act "financial year" means a period of 12 months beginning with 1 April. Liverpool was a rating authority and was therefore under a duty to make a rate for each year beginning with 1 April sufficient to meet its expenditure for that year. Collection of rates and payment of other revenues begin as soon as the rate is made and notified. The rates should be made by or soon after 1 April in order to facilitate collection and payment. Any delay in making the rate involves a loss to the authority of interest or borrowing charges by imposing a delay on collection and payment.

The Act of 1982 established the Audit Commission charged with appointing auditors to audit the accounts of local authorities. Each auditor must be a professionally qualified accountant. By section 20(1)

where it appears to the auditor carrying out an audit that "(*b*) that a loss has been incurred or deficiency caused by the wilful misconduct of any person" the auditor is to certify the amount involved and the Act provides for the recovery of that amount from the person guilty of wilful misconduct. If a local authority does not make an adequate rate or delays in making a rate, then the resultant loss of revenue or of interest or borrowing charges may be investigated by the auditor. If a councillor does not support the making of an adequate rate or shares responsibility for delay in making a rate, he shares responsibility for the loss thereby inflicted on the local authority and the auditor may find the councillor guilty of misconduct. If the councillor knows that he is failing in his duty to ensure that the local authority receives as much revenue from rates as is necessary and as soon as possible, the auditor may find that the councillor is guilty of wilful misconduct.

In March 1984, the Liverpool City Council was under a duty to consider making a rate for the financial year beginning 1 April 1984. In a report dated 19 March 1984, sent to all councillors, the district auditor explained the duty of the local authority and the duty of the councillors, indicated the liability of the councillors for breach of duty and warned that

> "I should find it difficult to see how the deliberate making of an inadequate rate could be anything other than wilful misconduct. . . . Members would in my view also be at risk if a rate was not made because no vote was taken or there was unreasonable delay in making a rate."

In the event, negotiations between the central government and the local authority for an increase in government grant continued long after 1 April and no action was taken to challenge the conduct of councillors, notwithstanding that no rate was fixed until July 1984. A copy of the report dated 19 March 1984 was subsequently sent to all councillors elected after that date in order that they too should be aware of their responsibilities and liabilities.

In December 1984 the council indorsed

> "the policies upon which the people of Liverpool elected the Labour Party to power, viz. [inter alia] to refuse to impose increases in rates, rents and charges to compensate for government cuts in grants"

and called for the reinstatement of cuts in grants said to amount to some £216m.

On 27 February 1985 the council rejected the proposal that a meeting of the council be arranged in order to set a rate for 1985–86. On 7 March 1985 the council resolved that

> "this council requires a budget of £265·4m. but, with a target of only £222·1m.—representing another £90m. stolen from the city in grant penalty—this council considers it will be impossible to make a rate."

On 14 March 1985 in a Parliamentary answer which was drawn to the attention of the council, the Secretary of State for the Environment

made it clear that no more government money would be provided, that "no rating authority can now have any excuse for delay in carrying out its duty to make a lawful rate," and that government grants for 1985–86 would not be paid until a rate had been fixed. The minister reminded

> "all councillors that if a failure to rate leads to a loss or deficiency and the auditor considers that this results from wilful misconduct, then those responsible may be surcharged."

On 10 April 1985 the district auditor, in a report to the council, expressed his concern at "the council's failure to make a valid rate for the financial year which commenced on 1 April 1985." He advised that "failure to make a lawful rate would be a clear breach of duty and that deliberate failure to do so would be wilful misconduct." He concluded by urging

> "the council in its own best interests, as well as those of individual members, employees and the local community, that a rate should be made at a very early date. That rate needs to be matched with plans to operate within available resources."

In May the council again declined to consider making a budget or a rate. On 21 May 1985 the auditor made a further report to the council and sent a copy of his report to each councillor. After referring to the reports dated 19 March 1984 and 10 April 1985, the auditor continued:

> "By its continued failure to make a rate the council and individual members have placed themselves seriously at risk. . . . I must now give the council notice that unless it makes a lawful rate at the earliest opportunity and in any event before the end of May I shall forthwith commence action under section 20 to recover any losses occasioned by the failure to make a rate from the members responsible for incurring them. . . . Yet again and for the last time I urge the council most strongly to comply with its statutory duty to make a lawful rate and to do so with the utmost speed."

On 6 June 1985 the Audit Commission directed an extraordinary audit to be carried out.

On 14 June 1985 the council considered a resolution that, inter alia:

> "A rate increase of 9 per cent. be approved and the difference of £29m. be made up by the return of grant moneys stolen from the people of Liverpool by the Tory government since 1979."

It appears from the revised budget summary, however, that the difference between budgeted revenue and budgeted expenditure on the basis of the increased rate proposed would amount to £117m. The rate proposed to be fixed was therefore inadequate and the city solicitor advised the council before they passed the resolution that the resolution would be contrary to law. The resolution fixing a rate based on a 9 per cent. increase was however passed with the support of the appellants.

The respondent auditor was appointed auditor for the purpose of the extraordinary audit and on 26 June 1985 gave notice to each of the appellants that he was considering certifying that the appellants had been guilty of wilful misconduct. The auditor asserted that the

documentary evidence which he particularised and which consisted of the relevant minutes of the meetings of the council and its committees and the relevant reports of its officers including the reports of the district auditor

> "show that there was no lawful justification for the delay in the making of the rate. The council has thus disregarded the advice and warnings given by me, my predecessors and its officers."

The auditor invited representations in writing by 19 July 1985 and intimated that he would defer making a decision until he had considered the appellants' representations.

On 19 July 1985 the appellants submitted detailed and careful representations which had been drafted with the assistance of the chief executive of Liverpool. The facts to which the auditor had drawn attention could not be and were not disputed. The appellants denied wilful misconduct on three grounds. First they said that at all times they had acted in what they sincerely believed to be the best interests of the ratepayers and citizens of Liverpool. My Lords, political leaders from Robespierre, the sea-green incorruptible, to Gandhi, the prophet of non-violence, have acted in the sincere belief that it was necessary to break the nation's laws in the interests of the nation's citizens. Only Gandhi, who broke the salt laws, acknowledged in a celebrated exchange of courtesies with the British magistrate the correctness of his conviction and the appropriate imposition of a sentence of imprisonment which, however, hastened the repeal of the salt tax and the dawn of independence for India. The sincerity of the appellants provides no defence to a charge that they deliberately delayed after they had been warned that it was wrong of them to do so. Secondly, the appellants contended that they were entitled to delay in the hope and expectation that the government would thereby be compelled or persuaded to provide more money for Liverpool. But the government in March 1985 had made it quite clear that the councillors would be responsible if they did not make a rate based on current government grants. The appellants' belief that the government did not mean that which the government stated does not justify a delay which was bound to cause loss to Liverpool whatever the government might do. Thirdly, the appellants contended that they had delayed in 1984 without dire consequences to themselves, and were entitled to believe that they would escape from the consequences of delay in 1985. But both the government and the officers of Liverpool, at an early stage, made plain to the council that 1985 circumstances were different from 1984 circumstances, and that delay in 1985 would not be tolerated or excused. An offender cannot successfully plead by way of defence that he was not prosecuted for a similar offence on a previous occasion.

The appellants did not ask the auditor for an oral hearing but it is now said that the auditor should have invited the appellants to make oral representations before he ultimately made up his mind. My Lords, a councillor might have persuaded the auditor, if he was not already

persuaded, that the councillor was sincere in his belief that he could not sacrifice the policy for which he had been elected and sincere in the belief that a rigid adherence to the policy would enure for the benefit of the citizens of Liverpool even if it entailed a breach of the councillor's duty promptly to make an adequate rate to provide for the year's expenditure. But the councillor's beliefs could not alter the councillor's duty or excuse a deliberate breach of that duty. In the voluminous evidence and in the addresses of counsel I have been unable to discern any grounds for the assertion that the oral representations of a councillor could have supplied a defence which was lacking from the written representations of the appellants or could have validated or reinforced possible defences foreshadowed in those written representations. The facts disclosed by the documents were incontrovertible and damning. The auditor had no choice but to find the appellants guilty of wilful misconduct. He certified on 6 September 1985 that the loss for which the appellants were liable amounted to £106,103.

Mr. Blom-Cooper, who appeared for the appellants, urged that the auditor should have invited the appellants to make oral representations before he reached the decision based on the written material. If any appellant had requested an oral hearing, I think that it would have been desirable for the auditor to have granted that request, first, so that the appellant could reiterate the sincerity of his motives and, secondly, so that the appellant might satisfy himself as to the judicial and impartial quality of the auditor. But sincerity is no excuse. An oral hearing could not detract from the force of the documentary evidence or supplement the written defence of the appellants in any material respects. I do not consider that the auditor was bound to follow a procedure which the appellants, acting under competent advice, did not suggest. The judicial and impartial qualities of the auditor are not in question.

Mr. Blom-Cooper urged that although the appellants did not request an oral hearing, they were deprived of a "legitimate expectation" of being invited to an oral hearing. Mr. Blom-Cooper does not allege that the appellants in fact expected to be invited to an oral hearing and does not speculate whether they would have accepted an invitation. Mr. Blom-Cooper submits that a legitimate expectation of being invited to an oral hearing is an objective fundamental right which, if not afforded, results in a breach of law or breach of natural justice which invalidates any decision based on written material. This extravagant language does not tempt me to elevate a catch-phrase into a principle. The true principle is that the auditor, like any other decision-maker, must act fairly. It was not unfair for the auditor to reach a decision on the basis of the written material served on and submitted by the appellants. In *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 it was unfair for the government to decide to deprive a civil servant of his right to belong to a trade union without first consulting the civil servant or his union; this House would have quashed the decision but for the overriding interests of national security which justified the government's decision. My noble and learned friend, Lord

A Roskill, pointed out, at p. 415, that "legitimate expectation" is a manifestation of the duty to act fairly. A decision may be unfair if the decision-maker deprives himself of the views of persons who will be affected by the decision. In the present case the appellants were afforded ample opportunity to express their views, and the auditor was enabled to reach a decision in the light of every defence which it was possible for B the appellants to urge.

The certificate of the auditor that a loss of £106,103 had been incurred by the wilful misconduct of the appellant was given pursuant to section 20(1) of the Local Government Finance Act 1982. By section 20(3) any person who is aggrieved by a decision of an auditor to certify that an amount is due from him may appeal against the decision to the C court and "the court may confirm, vary or quash the decision and give any certificate which the auditor could have given," and any certificate given by the court "shall be treated . . . as if it had been given by the auditor . . ."

On 6 October 1985 the appellants appealed under section 20(3) to the High Court. By R.S.C., Ord. 98 the appeal was brought by notice of D motion supported by an affidavit setting out the facts on which the appellants intended to rely at the hearing. Ord. 98, r. 4(2) provides that evidence at the hearing shall be given by affidavit, except in so far as the court directs that the evidence shall be given orally. The appellants filed numerous affidavits and there were exhibited all the relevant documents which were considered by the auditor or to which the appellants wished to refer. The appeal was heard by a Divisional Court (Glidewell L.J. E and Caulfield and Russell JJ.). The appellants asked that the certificate given by the auditor be set aside and discharged. The appellants were invited to give oral evidence but declined the invitation. After a hearing lasting 10 days the appellants' applications were dismissed. The appellants appealed to the Court of Appeal (Lawton, Dillon and Woolf L.JJ.). The appeal was dismissed and, with leave of the Court of Appeal, this F present appeal has been brought to this House. Any oral evidence which could have been given by the appellants to the auditor could have been given on affidavit or orally to the Divisional Court. In these circumstances, Mr. Blom-Cooper did not urge the merits of the appellants' case. Having submitted that the procedure of the auditor was defective because he did not invite the appellants to give oral evidence, he next G submitted that in those circumstances the Divisional Court had no power to affirm the decision of the auditor.

My Lords, in reaching a decision an auditor may make mistakes of fact, law, or procedure. The auditor does not take evidence on oath and the information available to him may be incomplete. On an appeal from his decision, the court is entitled to consider any evidence from any H appellant or from any auditor or other expert. Such evidence is given on oath, either in the form of an affidavit or in the form of oral testimony. Evidence may be produced before the court which was never available to the auditor. The judges will draw their own conclusion from the

evidence before the court, will apply the law as judicially construed, and will adhere to court procedure. If the Divisional Court errs in law a further appeal lies. In my opinion, the court hearing an appeal under section 20 of the Act of 1982 is not powerless to confirm or vary the decision of an auditor merely because the decision of the auditor was defective, whether the defect relates to a matter of evidence, law or procedure. It is for the court to consider a certificate under section 20(3) in substitution for the certificate of the auditor.

Mr. Blom-Cooper relied on the dictum of Megarry J. in *Leary v. National Union of Vehicle Builders* [1971] Ch. 34, 49 that "a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body." This dictum was enunciated in connection with an appeal from one domestic tribunal to an appellate domestic tribunal. In *Calvin v. Carr* [1980] A.C. 574, 593, Lord Wilberforce, delivering the advice of the Board, demurred to this dictum as being "too broadly stated" and, at p. 592, recognised and asserted

> "that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be 'cured' through appeal proceedings."

My Lords, when by statute an appeal lies from a tribunal to a court of law, the statute must be construed to determine whether the court is free to determine the appeal on the basis of the evidence before the court or is bound by the evidence or information laid before the tribunal. In the present case I have no doubt that it was for the court of law to consider whether "wilful misconduct" was proved and for that purpose to consider the evidence laid before the court. The task of the court was to "give any certificate which the auditor could have given" (section 20(3) of the Act of 1982). The court was not concerned with any defects in the procedure adopted by the auditor because those defects (if any) did not hamper the prosecution or conduct of the appeal. Different considerations apply if a statute only allows an appeal to a court of law on a question of law, or entitles or obliges the court of law to rely on the facts found by the tribunal. And the defects in the inquiry conducted by the tribunal may be so prejudicial to the aggrieved person that the court in its discretion may decide to quash the decision and not to proceed with an appeal on the merits in the absence of the views of the tribunal after a proper inquiry. In the present case the Divisional Court was entitled to consider the appeal on its merits and on the basis of the evidence presented to the court.

The auditor on the basis of the information available to him came to the conclusion that the appellants were guilty of wilful misconduct. The Divisional Court on the basis of that information supplemented by the additional evidence put forward by the appellants affirmed the decision of the auditor. I would dismiss this appeal. As regards costs there are technically 47 appeals before this House. Some appellants are legally aided, some are not. I would order each appellant to pay one forty-seventh of the auditor's costs of the appeal to this House, subject to the

usual protection afforded by the legal aid certificates. If and so far as the auditor does not recover a due proportion from a legally aided appellant and subject to any application of The Law Society, the auditor should be entitled to recover from the legal aid fund pursuant to section 13 of the Legal Aid Act 1973.

Lord Griffiths. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Templeman. For the reasons they give, I too would dismiss the appeal.

Appeal dismissed.
Each unassisted appellant to pay one forty-seventh of district auditor's costs in House of Lords; in each of appeals of assisted appellants one forty-seventh of district auditor's costs to be paid out of legal aid fund, order suspended for four weeks to enable The Law Society to object if wish.

Solicitors: Christian Fisher & Co.; Clifford-Turner; Solicitor and Secretary, Liverpool City Council.

M. G.

A

[HOUSE OF LORDS]

CURRAN AND ANOTHER . . . . . RESPONDENTS

AND

NORTHERN IRELAND CO-OWNERSHIP HOUSING ASSOCIATION LTD. AND OTHERS . APPELLANTS

B

1987 March 2, 3; April 8

Lord Bridge of Harwich, Lord Fraser of Tullybelton, Lord Griffiths, Lord Ackner, and Lord Oliver of Aylmerton

C

Negligence—Duty of care to whom?—Local authority—Statutory housing authority's payment of improvement grant—Defective work carried out—Whether authority owing duty of care to subsequent occupiers not to make payment in respect of defective work—Housing (Northern Ireland) Order 1976 (S.I. 1976 No. 1780 (N.I. 25)), arts. 47(2)(3), 60(5)

D

The plaintiffs purchased a house in Northern Ireland with the assistance of a mortgage from the fourth defendants, a statutory authority responsible for the provision of housing accommodation and the improvement of houses in the province. A predecessor in title of the vendors had constructed an extension to the house with the benefit of an improvement grant paid by the fourth defendants under the Housing (Northern Ireland) Order 1976. The plaintiffs alleged that the construction of the extension was so far defective that it was necessary to rebuild it completely and they brought an action against, inter alios, the fourth defendants alleging that they had been negligent in causing or permitting the works of extension to be carried out in a defective manner. In dealing with a number of preliminary issues, the judge held that the fourth defendants did not owe the plaintiffs any duty of care to ensure that works of extension paid for with the aid of the improvement grant were carried out in a manner free from defect and dismissed them from the action. On the plaintiffs' appeal, the Court of Appeal in Northern Ireland held that there was possibly, depending on the facts to be proved in the trial, a cause of action arising from breach of duty of care by the fourth defendants and that, accordingly, the statement of claim did not preclude the possibility of negligence.

E

F

G

On appeal by the fourth defendants:—

Held, allowing the appeal, that the only control over the building works open to the fourth defendants under the Order of 1976 was to withhold payment of the grant; that the purpose of that power was for the protection of the public revenue, not the recipient of the grant or successors in title; and that as the fourth defendants had no powers of control of building operations when paying an improvement grant they did not owe subsequent occupiers a duty to take care not to make payment in respect of defective work and they would accordingly be dismissed from the action (post, pp. 727H—728F, 729A–B).

H

Anns v. Merton London Borough Council [1978] A.C. 728, H.L.(E.) distinguished.

Decision of the Court of Appeal in Northern Ireland reversed.

The following cases are referred to in the opinion of Lord Bridge of Harwich:

Anns v. Merton London Borough Council [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.)

Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.)

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

Investors in Industry Commercial Properties Ltd. v. South Bedfordshire District Council [1986] Q.B. 1034; [1986] 2 W.L.R. 937; [1986] 1 All E.R. 787, C.A.

Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210; [1984] 3 W.L.R. 953; [1984] 3 All E.R. 529, H.L.(E.)

Sutherland Shire Council v. Heyman (1985) 59 A.L.J.R. 564

The following additional cases were cited in argument:

Dennis v. Charnwood Borough Council [1983] Q.B. 409; [1982] 3 W.L.R. 1064; [1982] 3 All E.R. 486, C.A.

Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373; [1972] 2 W.L.R. 299; [1972] 1 All E.R. 462, C.A.

Fellowes v. Rother District Council [1983] 1 All E.R. 513

Indian Towing Co. v. United States of America (1955) 350 U.S. 61

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 201, H.L.(Sc.)

McGeary v. Campbell [1975] N.I. 7

Yuen Kun Yeu v. Attorney-General of Hong Kong [1986] L.R.C.(Comm.) 300

Appeal from the Court of Appeal in Northern Ireland.

This was an appeal on a preliminary point of law by the fourth-named defendants, Northern Ireland Housing Executive, in an action by the plaintiffs, Michael Curran and Lucinda Curran, against (1) the Northern Ireland Co-ownership Housing Association Ltd., (2) Joseph Burns, (3) the Belfast City Council, (4) the Northern Ireland Housing Executive and (5) David Stewart practising as David Stewart & Co. (a firm), from an order of the Court of Appeal in Northern Ireland (Lord Lowry L.C.J., Gibson and O'Donnell L.JJ.) on 28 April 1986 allowing the plaintiffs' appeal against the order of Carswell J. dismissing the fourth defendants from the action on the ground that they did not owe the plaintiffs any duty of care to ensure that works of extension grant-aided by the fourth defendants would be carried out by a predecessor in title, the second defendant, in a manner free from defect.

The facts are set out in the opinion of Lord Bridge of Harwich.

F. P. Girvan Q.C. and *E. J. D. McBrien* (both of the Northern Ireland Bar) for the fourth defendants. All the conditions in the Housing (Northern Ireland) Order 1976 (S.I. 1976 No. 1780 (N.I. 25)), or in its successor legislation, are imposed to ensure that public money is properly spent and that the public obtains value for money. It is the public

interest, not that of an individual property owner, that the provisions are designed to protect. A comparison of the Public Health legislation considered in the line of cases including *Anns v. Merton London Borough Council* [1978] A.C. 278; *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210 and *Investors in Industry Commercial Properties Ltd. v. South Bedfordshire District Council* [1986] Q.B. 1034 and the relevant housing grants legislation in this case shows a marked contrast between the specific detailed duties and role of the public health authorities exercisable before, during and after the relevant constructions carried out and the deliberately peripheral role of the fourth defendants in relation to the actual construction work in respect of which grant aid is payable under Part VI of the Order of 1976. [See also *Fellowes v. Rother District Council* [1983] 1 All E.R. 513, 522 as to the need to look at the purpose of the legislation. Reference was also made to *McGeary v. Campbell* [1975] N.I. 7.] The legislation does nothing to detract from the freedom of contract between the housebuilder and the contractor doing the work. See *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1986] L.R.C. (Comm.) 300 as to the duty of care vis-à-vis such parties. It would not be fair or reasonable to impose a duty of care on the fourth defendants for, inter alia, the following reasons: (1) The fourth defendants have no power of enforcement. Its statutory role is peripheral to the contractual relationship of the houseowner/contractor. (2) The fourth defendants are dependent upon the honesty and good faith of the grant applicants. (3) The houseowner has complete freedom of contract with the builder and a successor in title also has freedom of contract in relation to the purchase of the property. (4) The grant provisions are a bonus to houseowners. To impose a duty of care would result in the fourth defendants having a double loss if the work went wrong—the cost of the grant and the liability of making good the defects. (5) The "floodgate" effects on the whole range of grant aid if a duty was held to exist must be considered.

Peter Smith Q.C. and *David Ringland* (both of the Northern Ireland Bar) for the plaintiffs. The question is whether or not, in the context of this particular legislation, there can be identified the two elements highlighted in the *Anns* case [1978] A.C. 728 and the *Peabody* case [1985] A.C. 210; proximity (as understood in the law of negligence) and whether it is just and reasonable that a duty of care *should* exist. The rationale of the *Anns* case, applicable to the present appeal, is that while strictly speaking there is no obligation to inspect, if a public authority chooses to send an inspector to the building, a duty of care arises. [See also *Indian Towing Co. v. United States of America* (1955) 350 U.S. 61; one may not have to act, but if one does there is a duty to act carefully. Reference was also made to *Dennis v. Charnwood Borough Council* [1983] Q.B. 409.] Dealing with the appellants' arguments, in considering the purpose of the legislation it is at least an object, if not *the* object, of the legislation to raise the standard of dwelling houses—a duty involving standards of public safety. While the fourth defendants may only play a peripheral role in the actual construction works, they have a central role by virtue of their provision of grants. Without the availability of a grant works of improvement would probably never be

A contemplated by a houseowner. On the question of fairness and reasonableness, that concept must be seen against the background that it is foreseeable that if there is an inspection of the work, others would suffer if the inspector was negligent: he is not entitled to assume that subsequent purchasers will have their own survey carried out. If the inspector negligently approves a grant the defects would probably go unremedied; if he observes the defects and the grant is withheld this B would almost certainly result in the defects being put right. If the result is that the fourth defendants have to pay twice, for the grant and then repairs, there is nothing extraordinary in that so far as the law is concerned. As to the question of reliance, what is relied upon is not a "direct inquiry" reliance, but rather an assumption having been drawn: see *Dutton v. Bognor Regis Urban District Council* (1972) Q.B. 409, C 395, *per* Lord Denning M.R.; 413, *per* Stamp L.J. In reply to the "floodgates" argument, see *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520, 539c, *per* Lord Roskill.

Girvan Q.C. was not called on to reply.

Their Lordships took time for consideration.

D

8 April. Lord Bridge of Harwich. My Lords, in June 1980 the plaintiffs bought a house at 50, Rodney Parade, Belfast. A predecessor in title had constructed an extension to the house comprising a kitchen and bathroom with the benefit of an improvement grant paid by the Northern Ireland Housing Executive ("the Executive") under Part VI of E the Housing (Northern Ireland) Order 1976 (1976 S.I. No. 1780 (N.I. No. 25)). It is alleged that the construction of the extension was so far defective that it must now be completely rebuilt at very substantial cost. These are the bare facts on which the preliminary issue of law arising in this appeal depends, so far as they may be ascertained from the diffuse and singularly uninformative statement of claim which pleads the plaintiffs' case.

F The action is brought against five defendants; (1) the plaintiffs' vendors, (2) the predecessor in title who constructed the extension, (3) the Belfast City Council as the authority responsible for the enforcement of the Building Regulations (Northern Ireland) 1973 (1972 S.I. No. 1996 (N.I. No. 25)), (4) the Executive and (5) a firm of surveyors employed by the Executive prior to the plaintiffs' purchase in 1980. The plaintiffs G purchased the house with the assistance of a mortgage loan made to them by the Executive in exercise of powers under the Housing Act (Northern Ireland) 1971. It was in connection with this loan that the surveyors, who are the fifth defendants, were employed. The primary case pleaded against the Executive was based on the mortgage loan. Four preliminary questions of law were ordered to be tried as between the plaintiffs and the Executive. The answers to three of these questions H given by Carswell J. and affirmed by the Court of Appeal in Northern Ireland (Lord Lowry L.C.J., Gibson and O'Donnell L.JJ.) have finally disposed of the case against the Executive as mortgagees. The fourth question was:

"Whether the fourth named defendant owed to the plaintiffs any duty of care to ensure that works of extension carried out by the second named defendant were carried out in a manner free from defect?

Carswell J. answered this question in the negative, but the Court of Appeal substituted the answer: "Possibly, depending on the facts proved." The Executive appeal from the decision of the Court of Appeal by leave of your Lordships' House.

The general objective of the power conferred on the Executive by the Order to pay improvement grants is clearly to encourage property owners, by offering financial assistance from the public purse, either to improve existing dwellings to bring them up to a decent standard or to convert property to provide new dwellings. The property eligible is at the lower end of the economic scale. The normal limit of rateable value of a dwelling capable of attracting a grant is £175. The normal limit of the amount of a grant is £3,200 in the case of the improvement of an existing dwelling or £3,700 in the case of a new dwelling produced by conversion. The amount of the grant may not normally exceed 75 per cent. of the expense to be incurred by the owner in carrying out the works of improvement or conversion. It is a condition of obtaining a grant that the applicant shall certify that the dwelling in respect of which it is paid will either be owner occupied as his residence for four years or will be available for letting as a residence to others for five years. If the certified intention is not fulfilled, the Executive have a discretion to require repayment of the whole or part of the grant.

The basic statutory machinery governing the approval of applications for improvement grants is contained in article 47, which provides:

"(1) The Executive shall pay an improvement grant if—(*a*) an application for such a grant, made in accordance with this Part, is approved by it, and (*b*) the conditions for the payment of the grant are fulfilled, and, subject to the provisions of this Part, the Executive may approve an application for an improvement grant in such circumstances as it thinks fit. (2) The Executive shall not approve an application for an improvement grant unless it is satisfied that, on completion of the relevant works, the dwelling, or, as the case may be, each of the dwellings to which the application relates will attain the required standard. (3) For the purposes of this article a dwelling shall be taken . . . to attain the required standard if the following conditions are fulfilled with respect to it, namely—(*a*) that it is provided with all the standard amenities for the exclusive use of its occupants; and (*b*) that it is in good repair (disregarding the state of internal decorative repair) having regard to its age and character and the locality in which it is situated; and (*c*) that it conforms with such requirements with respect to construction and physical conditions and the provision of services and amenities as may for the time being be specified by the Department [of the Environment] for the purposes of this article; and (*d*) that it is likely to provide satisfactory housing accommodation for a period of 15 years from the completion of the relevant works."

The "standard amenities" embrace such features as baths, showers, hot and cold water supply, basins, sinks and water closets. The requirements which have been specified by the Department of the Environment under article 47(3)(*c*) include a requirement that on completion of the works the dwelling shall be in a stable structural condition.

Articles 48 and 49 operate to determine the actual amount of the grant by reference to the estimated cost of carrying out the relevant works, though the amount eventually payable may be increased if it turns out that additional works are required which could not reasonably have been foreseen at the outset. Thus, it will be noted that the Executive must decide whether to approve a grant and must determine its amount before any works are carried out. These decisions can only be based upon inspection of the existing property and the plans, specifications and estimated costing of the works proposed.

Payment of the approved grant is governed by article 60, which provides, so far as presently relevant:

> "(3) A grant may be paid after the completion of the works towards the cost of which it is payable or part of it may be paid in instalments as the works progress and the balance after the completion of the works . . . (5) The payment of a grant or of any part thereof shall be conditional upon the works or the corresponding part of the works being executed to the satisfaction of the Executive."

The only relevant particulars of negligence alleged against the Executive are: "Causing or permitting works of extension to be carried out in a defective manner." It is perhaps right to add that by a late amendment of the statement of claim which Carswell J. gave the plaintiffs leave to make it was pleaded:

> "Prior to purchasing the premises the plaintiffs believed that an extension to the premises had been the object of an improvement grant paid by the fourth named defendant and accordingly believed that the extension had been properly constructed and in reliance on the said beliefs agreed to purchase the premises."

Carswell J., after a review of the relevant authorities, expressed his conclusion in the following paragraph:

> "I am of opinion that it is not one of the functions of the Housing Executive to protect against loss the successors in title of the recipients when it is exercising its statutory duty of paying out grants. It may be argued that one of those functions is to ensure that the housing stock is improved, and that grants are payable for that purpose. I do not think, however, that it is or should be the policy of the law to make the Executive liable to successive owners who might sustain loss if they bought the premises on the assumption that the improvements had been satisfactorily carried out. The obligation resting upon the Executive is to see to the proper application of public money in improvement grants. In my judgment that does not extend to the imposition of a duty towards future owners to see that the improvements themselves were done

satisfactorily, and the purposes for which the functions were conferred stop short of such an obligation. I do not think that it would be just or reasonable to place a burden of this nature upon the Housing Executive, and I consider that there is nothing in principle or authority to constrain me to do so."

The judgment of the Court of Appeal, delivered by Gibson L.J., was to the opposite effect. After an examination of the provisions of the Order of 1976 and of *Anns v. Merton London Borough Council* [1978] A.C. 728 and *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210, he expresses the court's conclusions as follows:

"Assuming, therefore, that the Executive did exercise the function of supervising or inspecting the work in progress prior to paying the grant as a means of satisfying itself that the work was up to the requisite standard, did its negligence in so doing amount to a breach of a duty of care to the then owner of the house? The purpose which Parliament had in mind in directing the payments to be made was to help the owner occupier of a dwelling house not only financially but also by ensuring in some measure that his occupation would be more beneficial to him and his family. If by reason of any neglect by the Executive that object was frustrated or he otherwise benefited less than was intended, I consider that a duty of care owed to him was breached and that he would have been entitled to recover damages at least to the measure indicated in *Anns'* case. It is also clear from the reasoning in that case that if the damage only becomes apparent during the occupancy of a later owner it is he who is entitled to claim.

"My conclusion, therefore, is that although it is speculative at this stage of the action whether the Executive did undertake the functions of supervision or inspection; or, if not, whether it had a duty to do so, there is a possible cause of action arising from breach of duty of care consequent upon the payment of the improvement grant."

My Lords, *Anns v. Merton London Borough Council* [1978] A.C. 728 may be said to represent the high water mark of a trend in the development of the law of negligence by your Lordships' House towards the elevation of the "neighbourhood" principle derived from the speech of Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562 into one of general application from which a duty of care may always be derived unless there are clear countervailing considerations to exclude it. In an article by Professors J. C. Smith and Peter Burns entitled "Donoghue v. Stevenson—The Not So Golden Anniversary" (1983) 46 M.L.R. 147 the trend to which I have referred was cogently criticised particularly in its tendency to obscure the important distinction between misfeasance and nonfeasance. One may also, perhaps, detect a note of criticism in the following passage from the speech of Lord Keith of Kinkel in the *Peabody* case [1985] A.C. 210, 239–240:

"Lord Atkin's famous enunciation of the general principles upon which the law of negligence is founded, in *Donoghue v. Stevenson*

[1932] A.C. 562, 580, has long been recognised as not intended to afford a comprehensive definition, to the effect that every situation which is capable of falling within the terms of the utterance and which results in loss automatically affords a remedy in damages. Lord Reid said in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1027: 'It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion. For example, causing economic loss is a different matter; for one thing, it is often caused by deliberate action. Competition involves traders being entitled to damage their rivals' interests by promoting their own, and there is a long chapter of the law determining in what circumstances owners of land can and in what circumstance they may not use their proprietary rights so as to injure their neighbours. But where negligence is involved the tendency has been to apply principles analogous to those stated by Lord Atkin: cf. *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465. And when a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty.'

"Lord Wilberforce spoke on similar lines in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751–752. 'Through the trilogy of cases in this House—*Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004, *per* Lord Reid at p. 1027.'

"There has been a tendency in some recent cases to treat these passages as being themselves of a definitive character. This is a temptation which should be resisted. The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff."

The *Peabody* case itself and the subsequent decision of the Court of Appeal in *Investors in Industry Commercial Properties Ltd. v. South Bedfordshire District Council* [1986] Q.B. 1034 illustrate some of the difficulties that arise in determining the precise scope of the duty owed by local authorities exercising statutory powers of control over building operations of the kind with which the *Anns* case was concerned. It is perhaps not inappropriate to note that in *Sutherland Shire Council v. Heymen* (1985) 59 A.L.J.R. 564 the High Court of Australia (Gibbs C.J., Mason, Wilson, Brennan and Deane JJ.) unanimously declined to follow the *Anns* case. The judgment in that case of Brennan J. seems to me particularly impressive in its reasoning.

I mention these considerations merely by way of introduction. I do not for a moment suggest that your Lordships' House is not bound by the *Anns* case if the ratio of that decision is applicable to the instant case. If it were thought that the law as declared by the House in the *Anns* case was so unsatisfactory as to call for reform, this might be an appropriate subject for consideration by the Law Commission. But, that said, your Lordships are, I think, entitled to be wary of effecting any extension of the principle applied in the *Anns* case whereby, although under no statutory duty, a statutory body may be held to owe a common law duty of care to exercise its statutory powers to control the activities of third parties in such a way as to save harmless those who may be adversely affected by those activities if they are not effectively controlled.

In the *Anns* case the plaintiffs were lessees who had acquired long leases of flats or maisonettes in a block which had been constructed with inadequate foundations. The deposited plans approved by the local authority showed foundations three feet deep. As built, the foundations were only two feet six inches deep. Subsidence occurred causing cracking in the walls and sloping of the floors in the plaintiffs' premises. The claim in negligence against the local authority alleged that under the building byelaws made pursuant to the powers conferred by the Public Health Act 1936 the local authority were under a duty to ensure that the building was constructed in accordance with the plans and that the local authority either failed to make any inspection before the foundations were covered or, if they inspected, negligently failed to discover that the foundations did not conform with the approved plans. The case came to the House on the preliminary issue whether on the facts alleged the local authority owed the plaintiffs any duty of care.

The first key passage in the speech of Lord Wilberforce is at [1978] A.C. 728, 753, where he said:

> "To summarise the statutory position. The Public Health Act 1936, in particular Part II, was enacted in order to provide for the health and safety of owners and occupiers of buildings, including dwelling houses, by inter alia setting standards to be complied with in construction, and by enabling local authorities, through building byelaws, to supervise and control the operations of builders. One of the particular matters within the area of local authority supervision is the foundations of buildings—clearly a matter of vital importance, particularly because this part of the building comes to be covered up as building proceeds. Thus any weakness or inadequacy will

create a hidden defect which whoever acquires the building has no means of discovering: in legal parlance there is no opportunity for intermediate inspection. So, by the byelaws, a definite standard is set for foundation work (see byelaw 18(1)(*b*) referred to above): the builder is under a statutory (sc. byelaw) duty to notify the local authority before covering up the foundations: the local authority has at this stage the right to inspect and to insist on any correction necessary to bring the work into conformity with the byelaws. It must be in the reasonable contemplation not only of the builder but also of the local authority that failure to comply with the byelaws' requirement as to foundations may give rise to a hidden defect which in the future may cause damage to the building affecting the safety and health of owners and occupiers. And as the building is intended to last, the class of owners and occupiers likely to be affected cannot be limited to those who go in immediately after construction."

Lord Wilberforce proceeds to a discussion of the difficult dichotomy between the exercise of statutory powers which is a matter of policy or discretion for the authority and that which he describes as "operational." He examines, and rejects, an argument that, if an authority are under no duty to exercise a power, they cannot be liable for exercising it negligently. The next key passage reads, at p. 755:

"Thus, to say that councils are under no duty to inspect, is not a sufficient statement of the position. They are under a duty to give proper consideration to the question whether they should inspect or not. Their immunity from attack, in the event of failure to inspect, in other words, though great is not absolute. And because it is not absolute, the necessary premise for the proposition 'if no duty to inspect, then no duty to take care in inspection' vanishes.

"Passing then to the duty as regards inspection, if made. On principle there must surely be a duty to exercise reasonable care. The standard of care must be related to the duty to be performed—namely to ensure compliance with the byelaws. It must be related to the fact that the person responsible for construction in accordance with the byelaws is the builder, and that the inspector's function is supervisory. It must be related to the fact that once the inspector has passed the foundations they will be covered up, with no subsequent opportunity for inspection. But this duty, heavily operational though it may be, is still a duty arising under the statute. There may be a discretionary element in its exercise—discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care. But if he can do this, he should, in principle, be able to sue."

It is from these two passages that three elements fundamental to the ratio of the decision can, in my opinion, be identified. First, the statutory power which the authority is alleged to have negligently failed

to exercise or to have exercised in a negligent way must be specifically directed to safeguarding the public, or some section of the public of which the plaintiff asserting the duty of care is a member, from the particular danger which has resulted; in the *Anns* case the danger of buildings being erected on inadequate foundations. Secondly, the power must have been such that its due exercise could have avoided the danger; if the defect in the foundations had been discovered before they were covered up, the authority had power under the statute to require that the defect be made good. Thirdly, the non-exercise or negligent exercise of the power must have created a hidden defect which cannot subsequently be discovered and remedied before damage results.

My Lords, the Order which must be considered in the instant case not only confers on the Executive no powers of control of building operations analogous to those on which the decision in the *Anns* case depended, it confers no powers of such control at all. Once approval has been given to an application for an improvement grant, the Executive have no powers under the Order to control the building owner, still less the builder whom he chooses to employ, in the execution of the works. Their only power is to withhold payment of the grant, or of an instalment of the grant, if the works or the relevant part of the works have not been executed to their satisfaction. With every respect to the Court of Appeal, to hold that the Executive owe a duty of care to a building owner which they can only perform by refusing to pay him the grant they have approved seems to me an almost bizarre conclusion. In so far as article 60(5) of the Order imposes any duty on the Executive to satisfy themselves that the grant-aided works have been properly executed, as opposed to conferring a power to withhold payment if not so satisfied, it seems to me clear that the purpose of imposing any such duty is for the protection of the public revenue, not of the recipients of the grant or their successors in title. I can conceive of no reason why the legislature should be thought in this single provision to have intended to duplicate the kind of control of building operations which is entrusted in Northern Ireland, as in England, to local authorities so that persons interested in dwellings improved with the aid of a grant should enjoy a double protection.

In a well known passage in the speech of Lord Morris of Borth-y-Gest in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1039, he said:

> "Apart from this I would conclude that, in the situation stipulated in the present case, it would not only be fair and reasonable that a duty of care should exist but that it would be contrary to the fitness of things were it not so. I doubt whether it is necessary to say, in cases where the court is asked whether in a particular situation a duty existed, that the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise, the court must not shrink from being the arbiter. As Lord Radcliffe said in his speech in *Davis Contractors Ltd. v. Fareham Urban District*

Council [1956] A.C. 696, 728, the court is 'the spokesman of the fair and reasonable man.'

Here, in my opinion, the dictates of good sense and the consideration of what is fair and reasonable point clearly against the imposition of any duty of care owed by the Executive to the plaintiffs and it would be contrary to the fitness of things to hold them to be under any such duty. If there was no duty of care, then the allegation that the plaintiffs purchased in reliance on the improvement grant cannot assist them.

For these reasons, and for those so well expressed in the passage quoted from the judgment of Carswell J., with which I entirely agree, I would allow this appeal, set aside the order of the Court of Appeal and restore the order of Carswell J.

Lord Fraser of Tullybelton. My Lords, I have had the benefit of reading in draft the speech of my noble and learned friend Lord Bridge of Harwich and I agree with it. For the reasons stated in it I would allow the appeal.

Lord Griffiths. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich. I agree with it and I too would allow the appeal for the reasons which he has given.

Lord Ackner. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich. I agree with it and I too would allow the appeal for the reasons which he has given.

Lord Oliver of Aylmerton. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich. I agree with it and I too would allow the appeal for the reasons which he has given.

Appeal allowed.

Solicitors: Metson Cross & Co. for Cleaver Fulton & Rankin, Belfast; Hextall Erskine & Co., for Peter Dornan & Co., Belfast.

C. T. B.

[PRIVY COUNCIL]

JOSEPH HAYIM HAYIM AND ANOTHER . . . APPELLANTS

AND

CITIBANK N.A. AND ANOTHER . . . . . RESPONDENTS

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1987 March 23, 24, 25, 26; May 5

Lord Bridge of Harwich, Lord Templeman, Lord Oliver of Aylmerton, Lord Goff of Chieveley and Sir Robert Megarry

Trusts—Trustee—Duty of trustee—Trustee of Hong Kong will holding property on trust for sale for trustee of American will—Hong Kong trustee postponing sale on instructions of American trustee—Whether breach of trust by Hong Kong trustee—Whether beneficiaries under American will having right of action against Hong Kong trustee

The testator appointed the first defendant executor and trustee of his American will which applied to all his American estate and all property which thereafter should become added to it. The plaintiffs, who were the testator's sons, and a charity were the beneficiaries under that will. By clause 10 the testator directed that if at the time of his death he owned a residence in Hong Kong and his brother or sister or both survived him, the first defendant "shall have no responsibility or duty with respect to such property . . . and my executor's and trustee's only duty and responsibility with respect thereto shall arise upon its receipt of the proceeds of said residence or upon the death of the survivor of my said brother and my said sister, whichever shall first occur . . ."

The testator appointed the second defendant executor and trustee of his Hong Kong will, by which the residue of his property outside the United States was to be held on trust for sale, with power to postpone sale, for the first defendant to be held upon the trusts of the American will. When the testator died his elderly brother and sister were living in his house in Hong Kong, and they continued to reside there rent free. In June 1981 the plaintiffs instructed the second defendant to sell the house, but in the interests of the testator's brother and sister, who were not beneficiaries under either will, the first defendant directed the second defendant not to sell the house although that was not in the interests of the beneficiaries of the American estate. Sale was postponed and the value of the house fell. The plaintiffs instituted proceedings claiming, inter alia, damages against the second defendant for breach of trust in delaying the sale of the house after June 1981. The judge awarded damages and the house was sold in 1985. On appeal by the second defendant the Court of Appeal of Hong Kong set aside that award and dismissed the plaintiffs' action.

On the plaintiffs' appeal to the Judicial Committee:—

Held, dismissing the appeal, that by the terms of the Hong Kong will the second defendant held the house on trust for the first defendant and not the beneficiaries interested under the American will, so that the second defendant was under a

duty to exercise its powers to sell or postpone sale pursuant to the lawful instructions of the first defendant; that clause 10 of the American will absolved the first defendant from any duty to the beneficiaries with regard to the house thus enabling the first defendant to disregard the interests of the beneficiaries and direct the second defendant to postpone sale in the interests of the testator's brother and sister, and in so doing the first defendant committed no breach of the trusts of the American will; and that, therefore, since the first defendant had properly carried out its duties in relation to the house as trustee of the American will, there were no special circumstances entitling the plaintiffs to bring proceedings directly against the second defendant, but that in any event no breach of the trusts of the Hong Kong will had been committed by the second defendant in implementing the lawful instructions of the first defendant, and the plaintiffs' action had properly been dismissed (post, pp. 742G—743A, E, 744C–F, 746A–B, H—747A, B, 748F–H).

Decision of the Court of Appeal of Hong Kong affirmed.

The following cases are referred to in the judgment of their Lordships:

Beningfield v. Baxter (1886) 12 App.Cas. 167, P.C.
Field, decd., In re [1971] 1 W.L.R. 555; [1971] 1 All E.R. 1104
Hastings-Bass, decd., In re [1975] Ch. 25; [1974] 2 W.L.R. 904; [1974] 2 All E.R. 193, C.A.
Meldrum v. Scorer (1887) 56 L.T. 471
Sharpe v. San Paulo Railway Co. (1873) L.R. 8 Ch.App. 597
Travis v. Milne (1851) 9 Hare 141
Wong Yu Shi v. Wong Ying Kuen (No. 1) [1957] H.K.L.R. 420
Yeatman v. Yeatman (1877) 7 Ch.D. 210

The following additional cases were cited in argument:

Baden, Delvaux and Lecuit v. Société General pour Favoriser le Développement du Commerce et de l'Industrie en France S.A. [1983] B.C.L.C. 325
De Bussche v. Alt (1878) 8 Ch.D. 286, C.A.
Lee v. Sankey (1873) L.R. 15 Eq. 204
Powell & Thomas v. Evan Jones & Co. [1905] 1 K.B. 11, C.A.

APPEAL (No. 17 of 1986) with leave of the Court of Appeal of Hong Kong by the plaintiffs, Joseph Hayim Hayim and George Isaac Hayim, from the judgment of the Court of Appeal of Hong Kong (Huggins V.-P., Cons and Fuad JJ.A.) given on 26 July 1985 allowing an appeal by the second defendant, Hong Kong Bank Trustee Ltd., from the judgment of Deputy Judge Barnett given in the High Court of Hong Kong on 16 January 1985. The Court of Appeal of Hong Kong dismissed the claims of the plaintiffs against the second defendant. The first defendant, Citibank N.A., took no part in the proceedings. The deputy judge had ordered that the property known as 41, Island Road, Deep Water Bay, Hong Kong, being property held by the second defendant as trustee of the Hong Kong will of Ellis Joseph Hayim deceased upon trust for sale, be sold by the second defendant; that inquiries should be made as to the date after

25 June 1981 by which the house should have been sold by the second defendant and the net loss (if any) of capital and income occasioned to the testator's estate by reason of the second defendant's failure to sell the house by that date; and that the second defendant should pay to the first defendant as trustee of the testator's American will upon trust for the second plaintiff half of that loss of income and for such persons as might be interested in the first plaintiff's interest and rights in the trusts under the American will half the loss of income up to his death on 14 October 1984. The second plaintiff was appointed the representative of the interests of the persons interested in the first plaintiff's interest and rights in the trusts under the Hong Kong and American wills of the testator.

The facts are stated in the judgment of their Lordships.

E. G. Nugee Q.C. and *B. K. Levy* for the plaintiffs. The scheme of the two wills is that the American will is to apply to all the testator's property in the United States of America at the date of his death and all the property which pursuant to any inter vivos or other testamentary disposition is added to his American estate. His Hong Kong will applies to all his property outside the United States of America including a house in Hong Kong the value of which has fluctuated widely since the testator's death. The second defendant deliberately refrained from selling that house because it wished to retain it as a home for the testator's brother and sister, and even though in June 1981 the plaintiffs instructed the second defendant to sell the house it was not sold until 1985. The second defendant's failure to sell the house after June 1981 knowing that the plaintiffs were interested solely in income and that the property was not producing any income, the reason for postponement of the sale being to enable the testator's brother and sister to live there rent free, constitutes a breach of trust by the second defendant.

The plaintiffs' submissions are: (1) In the absence of any authorisation the second defendant's failure to sell would have constituted a breach of trust. (2) The first defendant's direction to the second defendant not to sell in circumstances in which the second defendant knew that the income beneficiaries wanted the house sold does not exonerate the second defendant from liability. (3) Clause 10 of the American will confers no power on the first defendant in relation to the property, but only exonerates it from liability for doing nothing until receipt of the proceeds of sale or the death of the survivor of the testator's brother and sister. (4) The authorities which the plaintiffs signed in 1977 permitting the testator's brother and sister to remain in occupation were capable of being revoked by the plaintiffs irrespective of the attitude of the remainderman. (5) The plaintiffs are entitled to sue the second defendant direct joining the first defendant as a defendant because the first defendant is the immediate beneficiary under the Hong Kong will. Since the relationship between the head trustee and the ultimate beneficiaries under a two-tier trust is a direct relationship, the head trustee owes a duty to the ultimate beneficiaries. Accordingly, the second defendant owes a duty

A to the plaintiffs, although the first defendant has to be joined as a party to the action since the proceeds of sale had to be paid to the first defendant. (6) The second defendant being a professional trust corporation should not be excused from liability for breach of trust by section 60 of the Trustee Ordinance (Laws of Hong Kong, 1985 rev., c.29), because it did not act reasonably in that it failed to obtain independent legal advice or the directions of the court.

B The second defendant owes fiduciary duties to the first defendant and also to the beneficiaries under the American will. The second defendant cannot ignore the wishes of the ultimate beneficiaries, and since clause 10 of the American will provides that the first defendant is not bound to do anything in relation to the house, the second defendant is under a duty to look after the interests of the ultimate

C beneficiaries.

Even if the first defendant was acting in breach of trust in telling the second defendant not to sell the house, it was not that breach which caused the plaintiffs' loss but the second defendant's failure to sell. Normally the trustee who has a right of action is the proper person to enforce it. However if the first defendant had instituted proceedings against the second defendant for breach of trust the first

D defendant would have been met with the answer that it had told the second defendant not to sell, and in those circumstances the plaintiffs can themselves sue the second defendant. There is an impediment preventing the first defendant suing the second defendant, because the directions wrongly given by the first defendant would give the second defendant a defence to an action against it by the first

E defendant, but that defence is not available to the second defendant in an action against it by the plaintiffs, who can therefore sue the second defendant direct. The plaintiffs as beneficiaries interested in the property suffered loss by the fall in its value, and so they are entitled to sue the second defendant for breach of trust in not selling before 1985. The authorities show that there have to be special circumstances entitling a beneficiary to sue when prima facie the

F trustee is the proper person to bring the action, and here the impediment preventing the first defendant from bringing proceedings against the second defendant constitutes a special circumstance enabling the plaintiffs to sue the second defendant direct.

Where there is a trust for sale with power to postpone sale the trustees cannot postpone sale unless that is in the interests of the

G beneficiaries. It would be a breach of trust not to sell the Hong Kong house in order that the testator's brother and sister can continue to live there unless they are beneficiaries under the American will. The testator wanted to avoid estate duty and so it was essential that his brother and sister should not have any interest in the house which would give rise to estate duty. To construe clause 10 as making them objects of a discretionary power would mean that they had an interest

H in the property, which would be contrary to the testator's intention.

By reason of clause 10 the first defendant is under no liability for failing to raise any income from the house for the beneficiaries. However there is no similar clause in the Hong Kong will exonerating

the second defendant. Clause 10 does not give the first defendant power to tell the second defendant to do nothing with regard to the house, nor does it exonerate the second defendant if it follows such a direction.

The effect of the two wills read together is that the discretion when to sell the house is given to the second defendant, and the first defendant is not to be penalised for not interfering. Clause 10 of the American will relieves the first defendant from any penalty for being passive with regard to the house, but it would be contrary to the terms of the clause for the first defendant to be entitled to give any directions concerning the house to the second defendant. Clause 10 does not relieve the second defendant from its duty to exercise its discretion properly. The second defendant has to exercise that discretion as it thinks fit and it cannot avoid doing so by asking the first defendant for directions, although it can by obtaining directions from all the beneficiaries. If the second defendant acts in a way which it knows to be contrary to the interests of the beneficiaries it is not relieved from responsibility by doing so on the instructions of the first defendant.

It was a close-knit family and there was no reason to suppose the plaintiffs would not agree to the testator's brother and sister residing in the house, and they did agree to that for four years after the testator's death. Clause 10 does not give the first defendant a discretion to permit the testator's brother and sister to reside in the property, but merely relieves the first defendant from liability if the second defendant does not properly exercise its power of sale. Immediately after the testator's death the second defendant sought and obtained the agreement of all the beneficiaries to postponement of the sale of the house, and it was for the beneficiaries and the second defendant to decide what should happen to the property.

Powers are vested in trustees for the benefit of the persons beneficially interested. The plaintiffs and the charity are the only ones beneficially interested, and it is a fraud on the power for the second defendant to exercise its discretion to postpone sale not for their benefit but for the benefit of the testator's brother and sister, who are not beneficiaries under either will. [Reference was made to the definition of a trust in *Pettit on Equity,* 3rd ed. (1974), p. 16.] If there are various tiers of trusts the head trustees are constructive trustees for the beneficiaries under the trust at the bottom. Therefore the second defendant owes duties to the plaintiffs.

The second defendant should have sold the house within a reasonable time after being informed by the plaintiffs that they no longer wanted sale of the house to be postponed. The second defendant should have ignored the first defendant's directions and should have considered the interests of the persons for whose benefit the property was held, and the second defendant could not properly have concluded that it was for their benefit that the property should be held indefinitely. The second defendant did not properly exercise its discretion, because it had no power to postpone sale to enable the testator's brother and sister to reside there.

A The testator trusted the second defendant to exercise its discretion properly, and he provided that the first defendant need not interfere with the exercise of that discretion by the second defendant during the lives of his brother and sister. The exoneration given to the first defendant by clause 10 does not prevent the beneficiaries from enforcing their rights against the second defendant, and since the second defendant did not exercise its discretion to postpone sale on B proper principles the plaintiffs are entitled to complain. Once their consent was withdrawn the second defendant had no authority to postpone sale simply to benefit the testator's brother and sister.

The fact that the first defendant is the intermediate trustee is irrelevant in the circumstances. The duty of the primary trustee is owed to the beneficiaries of the derivative trust whatever the position of the intermediate C trustee. If the second defendant had sold the house at a gross undervalue, by virtue of clause 10 the first defendant was not required to do anything about that, but the beneficiaries could sue the second defendant for that breach of trust. The beneficiaries have a right to enforce the trust directly against the primary trustee. The second defendant owes a fiduciary duty to the plaintiffs and the charity, and the first defendant's protection from liability does not relieve the second defendant from liability to those D beneficiaries for breach of trust. The plaintiffs have locus standi in the Hong Kong courts, because the duty owed to them by the second defendant is one which a court of equity will enforce.

Without clause 10 the first defendant would not have been entitled to do nothing, and it would have had to force the second defendant to sell the house unless all the beneficiaries agreed to sale being postponed. E Clause 10 gives the first defendant a choice whether or not to give instructions to the second defendant, but the second defendant does not necessarily have to act on such instructions.

The first issue raised in this appeal is whether the second defendant's failure to sell the property would have constituted a breach of trust in the absence of the consents of the beneficiaries to postponement of the sale predicated by the trust for sale. A trustee has a duty to hold F property impartially as between the beneficiaries: *Underhill's Law of Trusts and Trustees,* 13th ed. (1979), p. 414. Accordingly, a trustee must not exercise his powers so as to confer a benefit on someone who is not a beneficiary.

The second issue is whether, if the first issue is answered in the affirmative, a direction to postpone sale given by the first defendant, in G circumstances where the second defendant knew that the income beneficiaries wanted the property sold, was sufficient to exonerate the second defendant. Both the second defendant as trustee of the Hong Kong will and the first defendant as trustee of the American will knew that the postponement was directed to alleviating the situation of persons who were not beneficiaries and that the income beneficiaries would be deprived of all benefit under the trusts so long as the postponement H continued. In those circumstances the second defendant was not entitled to rely on the directions given by the first defendant as authorising a postponement which it knew to be contrary to the income beneficiaries' interests and wishes. The first defendant was not beneficially interested

in the Hong Kong estate, but only in a fiduciary capacity. The applicable principle is that a person who receives trust property with notice that it is trust property is a constructive trustee for the persons beneficially interested under the trust and as such cannot accept a direction to deal with that trust property which he knows to be given in breach of trust.

Analogous cases support the proposition that in a two-tier relationship a direct fiduciary obligation is owed by the head trustee to the ultimate beneficiaries: see the agency cases of *De Bussche v. Alt* (1878) 8 Ch.D. 286 and *Powell & Thomas v. Evan Jones & Co.* [1905] 1 K.B. 11. In sub-bailment the same principle applies: *Halsbury's Laws of England,* 4th ed., vol. 2 (1973), para. 1541, p. 174. Similarly if there is an absolute equitable assignment of a chose in action the assignee can sue in his own name without making the assignor a party to the action, although a debtor who has received notice of the assignment cannot obtain a good discharge without the concurrence of the assignee: *Halsbury's Laws of England,* 4th ed., vol. 6 (1974), paras. 69 and 70, pp. 41–42. Where a trustee sues a debtor to the trust estate, the debtor can set-off against the trustee's claim an amount due to him from the beneficiary: *Halsbury's Laws of England,* 4th ed., vol. 42 (1983), para. 459, p. 260. Reliance is also placed upon *Baden, Delvaux and Lecuit v. Société General pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.* [1983] B.C.L.C. 325 and *Lee v. Sankey* (1873) L.R. 15 Eq. 204.

The third issue is whether clause 10 authorised the first defendant to instruct the second defendant not to sell the property despite the knowledge of both of them that the income beneficiaries wanted the property sold and that it was not producing any income. The true position is that clause 10 is an exonerating provision and no more. It does not make the income beneficiaries objects of a discretionary power vested in the first defendant: if this had been the intention it would have been easy for the testator to have said so in clear terms. It exonerates inactivity on the part of the first defendant, but it does not exonerate the second defendant at all and it does not authorise the first defendant to give any positive instructions to the second defendant to defer the sale of the property.

The fourth issue is whether the plaintiffs are entitled to sue the second defendant direct without first taking proceedings against the first defendant in the State of New York. The second defendant being a constructive trustee for the plaintiffs owing fiduciary duties to them, they can sue the second defendant direct. It is not necessary for there to be special circumstances entitling the plaintiffs to bring proceedings directly against the second defendant, but if so there are special circumstances because the first defendant would have difficulty in bringing proceedings against the second defendant for breach of trust in not selling earlier in view of the instructions it gave to the second defendant. [Reference was made to *Travis v. Milne* (1851) 9 Hare 141; *Yeatman v. Yeatman* (1877) 7 Ch.D. 210; *Beningfield v. Baxter* (1886) 12 App.Cas. 167; *Meldrum v. Scorer* (1887) 56 L.T. 471; *Wong Yu Shi v. Wong Ying Kuen (No. 1)* [1957] H.K.L.R. 420 and *In re Field, decd.* [1971] 1 W.L.R. 555.]

Levy following. The second defendant contends that on its true construction clause 10 operated to confer on the first defendant a discretion to permit the testator's brother and sister to reside in the house, but that contention directly conflicts with the express words of clause 10. If there was such a discretionary power there would necessarily be duties imposed on the first defendant, which would have to consider from time to time whether or not to exercise the power, whereas clause 10 states that the first defendant is to have no responsibility or duty with respect to the house until one of the specified events occurs.

Andrew Morritt Q.C. and *W. D. Ainger* for the second defendant. The plaintiffs' right to enjoy the testator's bounty was necessarily subject to the provisions of clause 10 of the American will. Clause 10 conferred on the first defendant a power enabling it properly to request the second defendant not to sell the property but to permit the testator's brother and sister to live there rent free for as long as the first defendant wished. That power justified the first defendant asking the second defendant not to sell and, as a corollary, to leave the testator's brother and sister there rent free. The second defendant was entitled to act on that request from its beneficiary, the first defendant.

The second defendant does not owe a fiduciary duty to the plaintiffs so as to enable them to sue direct unless there are special circumstances. There are two separate trusts, and the beneficiaries and trustees under each are different. Under the Hong Kong will the trustee is the second defendant and the beneficiary is the first defendant. Under the American will the trustee is the first defendant and the beneficiaries are the plaintiffs and the Jewish charity. Neither defendant can be categorised as a bare trustee. Under the American will the first defendant has different powers and obligations from those of the second defendant under the Hong Kong will. Each will is regulated by different systems of law. The two wills cannot be run together, although their overall effect has to be considered. The testator declared that they were to be independent.

On behalf of the plaintiffs it was submitted that trustees of a head settlement owe fiduciary duties to the ultimate owners of the settled property however many sub-settlements intervene. That is correct if the trustees are bare trustees, but if they are not and they have duties to perform their fiduciary duties are not owed to the beneficiaries under the sub-trust but only to the beneficiaries under the head trust. The beneficiaries under the head trust to whom such duties are owed are: (i) those named in the trust instrument; (ii) if any of them assign their interest to a third party, the trustees owe a duty to the assignee if they know of the assignment; and (iii) if the reversioner declares himself to be a bare trustee for a third party, the trustees' duty is owed to the third party. With regard to simple and special trusts see *Snell's Principles of Equity,* 28th ed. (1982), p. 104.

The authorities show that a beneficiary under a sub-trust can only bring an action against the trustees of the head-trust if there are special circumstances. If sub-trustees act in breach of their trust and involve the head trustees, who know or ought to know of the breach of trust, they will be liable as constructive trustees for their complicity in the breach of

trust by the sub-trustees in respect of any loss suffered by the beneficiaries. If there is a breach of trust by the sub-trustees, normally they themselves will be sued. In those circumstances the beneficiaries under the sub-trust will have a claim: (i) against the sub-trustees for their breach of trust; (ii) against the head trustees for complicity in the sub-trustees' breach of trust; and (iii) in certain cases against the head trustees to enforce the rights of the sub-trustees. The plaintiffs make no claim under (i) and (ii), and for (iii) special circumstances are necessary and usually there must be a breach of trust by the sub-trustee. [Reference was made to *Yeatman v. Yeatman,* 7 Ch.D. 210; *Meldrum v. Scorer,* 56 L.T. 471; *Sharpe v. San Paulo Railway Co.* (1873) L.R. 8 Ch.App. 597; *Wong Yu Shi v. Wong Ying Kuen (No. 1)* [1957] H.K.L.R. 420 and *In re Field, decd.* [1971] 1 W.L.R. 555.]

Analogies from other areas of the law are of no assistance, and *De Bussche v. Alt,* 8 Ch.D. 286 and *Powell & Thomas v. Evan Jones & Co.* [1905] 1 K.B. 11 turn on different principles.

On the plaintiffs' case as pleaded there was no allegation that the first defendant had acted in breach of trust. Under the Hong Kong will the first defendant was the named beneficiary and so the second defendant was only accountable to the first defendant. The first defendant was entitled under the Hong Kong and American wills to enforce the trust for sale or postpone sale as it thought fit, because clause 10 of the American will did not purport to interfere with the first defendant's rights and powers under the Hong Kong will. There being no allegation of breach of trust by the first defendant, the second defendant was entitled to rely on the first defendant's instructions without considering the interests of the ultimate beneficiaries. That accords with the scheme devised by the testator and achieves his purposes.

Alternatively, clause 10 conferred on the first defendant a discretion to permit the subsisting residence of the testator's brother and sister to continue for so long as it wished. Accordingly, the plaintiffs could not complain about the continued residence of the testator's brother and sister since the first defendant in the exercise of its discretion had instructed the second defendant to allow such residence. The position of the first defendant under the Hong Kong will was that of a conventional residuary beneficiary. Although by clause 10 of the American will the testator directed that the first defendant should have no responsibility or duty in relation to the Hong Kong house until a specified event, and exonerated it from liability for inactivity prior to that, nonetheless the first defendant always had the power or right to call for the residence or its proceeds or to enforce the execution of the trusts of residue under the Hong Kong will. Clause 10 did not exclude the first defendant's rights and powers with regard to the house, but only its responsibility and duty. If the second defendant did not properly insure the house, the first defendant had power but no duty to compel the first defendant to do so.

The second defendant was entitled to have regard to the interests of the testator's brother and sister, because that was the evident intention of clause 10. *In re Hastings-Bass, decd.* [1975] Ch. 25 shows the way in which trustees' powers have to be exercised. By clause 10 the first

A defendant had no duty to call for the sale of the house, but it had power to decide whether to do so or not, and in exercising that choice it was entitled to take into account the interests of the testator's brother and sister.

The plaintiffs' submission that the testator wished to benefit his brother and sister at the discretion of the plaintiffs, who had to decide whether or not the testator's brother and sister should continue to live in B the house, cannot be correct. There is no reference in either will to the plaintiffs' consent being required. It was for the first defendant to exercise its powers and rights, if it thought fit, for the purpose of providing a home for the testator's brother and sister, and the first defendant was entitled to have regard to their interests. The first defendant did not wish the property to be sold because it wanted it to C remain the residence of the testator's brother and sister. The second defendant knew that, and that was its reason for not selling the house until 1985.

The plaintiffs have no locus standi to sue the second defendant. There was no breach of trust by the first defendant and no special circumstances entitling the plaintiffs to sue. Clause 10 authorised the first defendant to direct the second defendant not to sell, and the second D defendant was entitled to rely on the first defendant's instructions.

Nugee Q.C. in reply. The second defendant's submission as to the proper construction of clause 10 would mean that the first defendant had a duty to consider whether to exercise its discretion to permit the testator's brother and sister to reside in the house. That directly contradicts clause 10, which states that the first defendant is to have no E responsibility or duty with respect to the property until one of the specified events occurs. Clause 10 merely confers an exemption on the first defendant and not a discretion.

The first defendant had no power apart from clause 10 to postpone sale, because its duties were owed to the beneficiaries under the American will. The discretion to postpone sale was vested in the second defendant, and there is nothing in the Hong Kong will to justify it F refraining from selling in the interests of the testator's brother and sister. There is nothing in clause 10 of the American will to confer on the first defendant power to direct the second defendant not to sell so that the testator's brother and sister could continue to live there. The second defendant had to have regard to the interests of the beneficiaries under the American will, and so it had no power to postpone sale unless G the plaintiffs and the charity consented. Once the plaintiffs withdrew their consent there was a breach of trust by the second defendant in postponing sale on the instructions of the first defendant knowing that the first defendant was giving those instructions for the benefit of the testator's brother and sister. The first defendant had no power or discretion to instruct the second defendant not to sell, and the second defendant wrongfully delegated to the first defendant the exercise of the H power to postpone sale. Clause 10 gave the first defendant a choice to do nothing or to act properly, but it could not act improperly and give directions not to sell in the interests of the testator's brother and sister. The plaintiffs have a direct claim against the second defendant because

it was involved in that improper act by the first defendant. The reason for postponement of the sale was to benefit non-objects of the trust, and therefore the second defendant was plainly acting in breach of trust and the beneficiaries should be able to sue the second defendant. In view of the improper direction by the first defendant to the second defendant not to sell the house, the plaintiffs are entitled to bring an action directly against the second defendant.

The plaintiffs agree with the three possible claims by beneficiaries under a sub-trust suggested by Mr. Morritt. They make no claim under (i) against the first defendant. They do claim under (ii) that the second defendant is a constructive trustee. They also claim under (iii) to enforce the rights of the first defendant, which has disentitled itself from doing so by consenting to the postponement of the sale.

Where there are two-tier trusts the beneficiaries can enforce their rights against the head trustee direct if he is a constructive trustee and special circumstances need not be shown. That is the position here, and so the plaintiffs can sue the second defendant direct. *Sharpe v. San Paulo Railway Co.*, L.R. 8 Ch.App. 597, was a case in which contractors had assigned the benefit of payments due to them to a trustee for their creditors. Any individual creditor could only sue to enforce the trustee's contractual right, and in that kind of case one of many creditors could not sue in the absence of special circumstances. The case is of no relevance to the present case, where the second defendant was a constructive trustee for and owed fiduciary duties to the plaintiffs and they can sue direct without having to show special circumstances. *Yeatman v. Yeatman*, 7 Ch.D. 210, was the case of the same kind, in which there was no two-tier or constructive trust.

The first defendant did not appear and was not represented.

Cur. adv. vult.

5 May. The judgment of their Lordships was delivered by Lord Templeman.

In the year 1959 the testator, Ellis Joseph Hayim, purchased a house for his residence at 41, Island Road, Deep Water Bay, Hong Kong. The testator had two sons the plaintiffs, Joseph Hayim Hayim and George Isaac Hayim, who were then about 40 years of age. The Hong Kong house was occupied by the testator, his wife who died in 1966, his mother who also died in 1966, his brother Albert, his sister Maisie and Maisie's husband Reubin David Abraham who died in 1970. By his American will dated 13 July 1972 the testator disposed of his American estate defined as all his property in the United States of America and:

> "all property which, pursuant to any inter vivos or any other testamentary disposition, shall at any time be added to and become a part of my American estate."

The testator appointed the first defendant, Citibank N.A., to be the executor and trustee of his American will and directed the first defendant to divide the residue of his American estate into two equal moieties, one to be held upon protective trusts for the benefit of his son Joseph during

his life and the other upon protective trusts for the benefit of his son George during his life. Subject to these dispositions and to legacies bequeathed to the sons' widows the residue of the American estate was given by the American will to the American Jewish Joint Distribution Committee Inc. in furtherance of its charitable purposes. Clause 10 of the American will was in these terms:

> "At the time of my death I may be the owner of a residence in Hong Kong. If either of my brother, Albert Joseph Hayim, and my sister, Maisie Ruby Abraham, shall survive me, then I direct that my executor and trustee shall have no responsibility or duty with respect to such property, including, without limitation, any duty to take title to such property, to collect the proceeds from its sale or to collect any rent from said property; and my executor's and trustee's only duty and responsibility with respect thereto shall arise upon its receipt of the proceeds of said residence or upon the death of the survivor of my said brother and my said sister, whichever shall first occur, and shall extend only to such property as it exists at the time of the death of such survivor or to the proceeds thereof."

By his Hong Kong will dated 25 April 1975 the testator appointed the second defendant, Hong Kong Bank Trustee Ltd., to be the executor and trustee of his Hong Kong will and gave all the residue of his property outside the United States of America to the Hong Kong Bank:

> "Upon trust to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as my trustee shall in its absolute discretion think fit without being liable for loss upon trust to pay or transfer the proceeds of such sale calling in and conversion to [the first defendant] or other the executor or trustee for the time being of my American will to be held by such executor or trustee upon the trusts of my American will or such of the same as shall then be subsisting and capable of taking effect."

The testator died on 6 June 1977 possessed of considerable wealth and his American will and his Hong Kong will were duly proved by the first defendant and the second defendant respectively. The Hong Kong residue included the Hong Kong house which became vested in the second defendant upon trust for sale with power to postpone sale and to hold the net proceeds of sale and rents and profits until sale upon trust for the first defendant to be held by the first defendant upon the trusts of the American will. Albert who was about 92 and Maisie who was about 87 in 1977 when the testator died remained in occupation of the Hong Kong house at first with the consent in writing of the first defendant, the plaintiffs and the Jewish charity. On 1 June 1981 however the plaintiffs by their legal advisers directed the second defendant to sell the Hong Kong house because the house was providing no income for the plaintiffs and the value of the house, which had been valued at HK$3,000,000 at the date of the testator's death in 1977 and had risen to HK$18,000,000 in 1981, was likely to diminish having regard to the

uncertainties in 1981 of the future of Hong Kong real estate. It was argued that the second defendant had no right to postpone the sale of the Hong Kong house in order to provide a home for Albert and Maisie who were not beneficiaries interested in the trusts of the house. The plaintiffs offered to find alternative accommodation for Albert and Maisie where they would be better looked after. Albert was however opposed to any move and the first defendant took the view that it would be cruel to Albert and possibly fatal to Maisie whose health was declining to require them to leave the house. The Jewish charity on being apprised of the views of the first defendant was content to rely on the discretion of the trustees. The second defendant was instructed by the first defendant not to sell the house. The plaintiffs protested that the second defendant owed a duty to the plaintiffs and was not entitled to obey the instructions given by the first defendant.

On 4 November 1982 the testator's sister Maisie died aged about 92. On 15 January 1983 the plaintiffs began proceedings in the High Court of Hong Kong against the first and second defendants for an order that the house be sold and for damages to be awarded against the second defendant for breach of the trusts of the Hong Kong will by the delay of the second defendant in selling the house since June 1981. No relief was sought against the first defendant. The testator's son Joseph died on 14 October 1984 aged 65 and the action was continued by George and by the personal representatives of Joseph. On 16 January 1985 Deputy Judge Barnett made the order sought by the plaintiffs against the second defendant. The testator's brother Albert died in May 1985 aged about 99. On 26 July 1985 the Court of Appeal of Hong Kong (Huggins V.-P., Cons and Fuad JJ.A.) allowed an appeal by the second defendant, set aside the orders made by Deputy Judge Barnett and dismissed the action brought by the plaintiffs on the ground that the second defendant had not committed any breach of trust. The house was sold on 18 September 1985 for HK$10,000,000. George and the personal representatives of Joseph now appeal to Her Majesty in Council to restore the order made by Deputy Judge Barnett for the assessment and payment by the second defendant of damages for breach of trust in postponing the sale of the house between 1981 and 1985.

For the purposes of these proceedings the laws of the United States applicable to the American will and the laws of Hong Kong applicable to the Hong Kong will are assumed, in the absence of any evidence to the contrary, to be of the same effect as the laws of England.

The first question is whether the second defendant owed a duty to the beneficiaries interested under the American will not to obey the instructions of the first defendant to postpone the sale of the Hong Kong house in the interests of Albert and Maisie. Subject to the payment of or provision for the funeral and testamentary expenses and debts of the testator, administration costs and remuneration, the second defendant held the residue of the testator's property in Hong Kong and elsewhere outside the United States of America and the proceeds of sale upon trust for the first defendant. The power of the second defendant to postpone the sale was also held in trust for the first defendant and could only be exercised by the second defendant

in accordance with the lawful directions of the first defendant. The interests and powers of the first defendant relating to the Hong Kong property were held by the first defendant upon the trusts and with and subject to the powers and provisions of the American will including clause 10 and the beneficiaries interested under the American will were the plaintiffs and the Jewish charity. The residue of the Hong Kong property consisted of the Hong Kong house valued at HK$3,000,000 and stocks shares and other investments valued at HK$10,000,000. The second defendant had no power or duty to decide whether any of the Hong Kong property should be sold or retained in the interests of the first defendant. It was for the first defendant to decide whether having regard to the trusts powers and provisions of the American will the Hong Kong property held by the second defendant in trust for the first defendant should be retained or sold. In the case of Hong Kong investments to which clause 10 of the American will did not apply the first defendant owed a duty to the beneficiaries interested under the American will to take advice and to decide whether the investments should be sold or retained in the best interests of the beneficiaries without regard to the interests of Albert and Maisie. The first defendant was under a duty to the beneficiaries interested in the American will to communicate its decisions to the second defendant and to ensure that those decisions were carried out even if necessary by obtaining the removal of the second defendant as trustee of the Hong Kong will or by obtaining a transfer of the Hong Kong property from the second defendant to the first defendant or as the first defendant directed. The second defendant had no power or duty to interfere in the administration of the trusts of the American will. The second defendant was bound to give effect to the lawful decisions of the first defendant in relation to Hong Kong property. The second defendant was not however entitled or bound to give effect to any decision of the first defendant which constituted a breach of the duty owed by the first defendant to the beneficiaries interested under the trusts of the American will. In the absence of clause 10, the decision of the first defendant to direct postponement of the sale of the Hong Kong house in the interests of Albert and Maisie and contrary to the interests of the beneficiaries interested under the American will would have been a breach of the duty owed by the first defendant as trustee of the American will to the beneficiaries under the American will and would have been unlawful. The second defendant knew that Albert and Maisie were not beneficiaries and knew that the decision made by the first defendant to direct postponement of the sale of the house was taken in the interests of Albert and Maisie and against the interests of the beneficiaries. In the absence of clause 10, the second defendant would have known or should have known that the instructions by the first defendant to postpone sale of the house were unlawful. The second defendant would have been liable to the beneficiaries under the American will for unlawfully complying with the unlawful decision of the first defendant. But if clause 10 entitled the first defendant to ignore the interests of the beneficiaries under the American will in the Hong

Kong house and to make a decision in the interests of Albert and Maisie then the second defendant was bound to accept that decision and comply with the directions given by the first defendant to postpone the sale of the house.

The second and crucial question therefore is whether the first defendant in giving directions to the second defendant to postpone the sale of the Hong Kong house in the interests of Albert and Maisie was in breach of the duty owed by the first defendant to act in the best interests of the beneficiaries interested under the American will. Without clause 10 the first defendant would have owed a duty to the beneficiaries to decide whether the house should be sold or retained in the interests of the beneficiaries. The first defendant would have been under a duty to ignore the interests of Albert and Maisie.

Clause 10 did not deprive the first defendant of the power to decide and direct the second defendant to sell or retain the house. Clause 10 did not extinguish or modify the duty of the second defendant to give effect to any lawful decision of the first defendant in respect of the house. Clause 10 relieved the first defendant of any "responsibility or duty with respect to" the house. The only responsibilities and duties of the first defendant under the American will were responsibilities and duties owed to the beneficiaries interested under the American will. Clause 10 relieved the first defendant of any responsibility or duty owed to the beneficiaries in respect of the house. The first defendant, relieved of any responsibility or duty to the beneficiaries, was entitled to decide to direct the second defendant to postpone the sale of the house in the interests of Albert and Maisie. In considering whether to decide to direct the second defendant to postpone sale the first defendant was entitled to consider the beneficiaries but owed no duty to the beneficiaries under the American will to consider them or decide in their favour and accordingly as against those beneficiaries the first defendant committed no breach of trust. If the first defendant made a decision to direct the sale of the house to be postponed in the interests of Albert and Maisie this was a decision which the first defendant was entitled to make by clause 10 of the American will and it was a decision to which the second defendant holding the house and the proceeds of the house and the power to postpone sale of the house in trust for the first defendant was bound to accept and implement. It is of course unusual for a testator to relieve the trustee of his will of any responsibility or duty in respect of trust property, but a testator may do as he pleases and in the present case the provisions of clause 10 are explicable and understandable.

When the testator made his American will in 1972 and when the testator made his Hong Kong will in 1975 it was plain that if (as happened) the Hong Kong house remained a home for the testator and for Albert and Maisie and if the testator predeceased Albert and Maisie, someone must decide whether and when Albert and Maisie, who were in the event about 92 and 87 years of age respectively at the death of the testator, should be obliged to leave the house. There were several courses of action open to the testator if he did not wish to give an interest in the house to Albert and Maisie. First the testator could have conferred on his two sons power to decide whether and when Albert

A and Maisie should be dispossessed. By his American will or his Hong Kong will the testator could have directed that the house be not sold without the consent of his sons or of one of his sons. The testator did not confer any power of decision on both or either of his sons. Secondly the testator could have allowed any decision with regard to Albert and Maisie and the house to be made by the beneficiaries interested in the American estate. If the testator had not inserted clause 10 of the B American will, Maisie and Albert could have been allowed to remain in the Hong Kong house rent free with the consent of all the beneficiaries namely the plaintiffs and the Jewish charity. There would have been no need to exonerate the first defendant from any responsibility or duty in respect of the house. Clause 10 is inconsistent with any intention on the part of the testator to leave Albert and Maisie to the mercy of the C beneficiaries. Thirdly the testator could have allowed the decision with regard to Albert and Maisie and the house to be made by the second defendant, but in that case something like clause 10 would have been inserted in the Hong Kong will. Fourthly the testator could have allowed the decision with regard to Albert and Maisie and the house to be made by the first defendant. It was logical that the first defendant should make a decision which must necessarily concern the plaintiffs on the one hand D and Albert and Maisie on the other hand. The first defendant would know whether the income of the American estate was sufficient to provide for the plaintiffs without calling in aid any income from the Hong Kong house or from the proceeds of sale of the Hong Kong house. The inevitable conclusion is that clause 10 was intended to enable the first defendant to decide that although Albert and Maisie were not E beneficially interested in the house nevertheless Albert and Maisie should be allowed to remain in the house. The testator gave effect to that intention by a provision which relieved the first defendant from all responsibility and duty to the beneficiaries in respect of the house.

Mr. Nugee submitted that the only object and effect of clause 10 was to enable the first defendant to wash its hands of any problems concerning the house so long as Albert and Maisie survived. But if the F beneficiaries agreed, there was no need to relieve the first defendant from responsibility. And if the beneficiaries did not agree then the first defendant would have to decide. If one beneficiary wished Albert and Maisie to occupy the house free of rent while the second beneficiary wished Albert and Maisie to occupy the house but to pay a rack rent and the third beneficiary wished the house to be sold with vacant G possession, then the second defendant holding in trust for the first defendant and only concerned under the trusts of the Hong Kong will would be entitled and bound to apply to the first defendant for a decision. Clause 10 of the American will and the terms of the Hong Kong will are not apt to transfer from the first defendant to the second defendant power to decide whether the Hong Kong house should be sold or retained in the interests of the beneficiaries under the American H will or otherwise. If the testator had wished to place responsibility for a decision on the second defendant he would have provided by the Hong Kong will that the second defendant should hold the proceeds of sale of the house in trust for the beneficiaries. In fact the testator by the Hong

Kong will directed the second defendant to hold the proceeds of sale of the house in trust for the first defendant and it was for the first defendant to decide when the house should be sold. Clause 10 relieved the first defendant of any responsibility or duty with respect to the house and therefore authorised the first defendant to make a decision that the sale of the house should be postponed without regard to the interests of the beneficiaries—an unusual but understandable provision if the testator wished the first defendant and no one else to decide whether and when Albert and Maisie should be required to leave the house. The first defendant did not commit a breach of the trusts of the American will by directing the second defendant to postpone sale. The second defendant did not commit a breach of the trusts of the Hong Kong will in complying with the lawful directions of the first defendant.

On behalf of the plaintiffs, Mr. Nugee disputes these conclusions. He argues in the first place that the first defendant committed a breach of trust of the American will by deciding to postpone the sale of the house. He says that clause 10 could not have been intended to absolve the first defendant from any duty to the beneficiaries, because in that event the first defendant could have used the house for its own purposes or allowed the second defendant to commit a breach of duty with respect to the house, for example, the duty to insure. But clause 10 in express terms relieved the first defendant from any duty in respect of the house. No doubt the testator was content to trust the first defendant. If the second defendant failed to insure or failed to implement any decision of the first defendant then the first defendant would have been entitled but not bound to take proceedings against the second defendant. Clause 10 enabled the first defendant to ensure that the house was retained by the second defendant yielding no rent during the lives of Albert and Maisie though under the trusts of the American will Albert and Maisie were not beneficiaries. Clause 10 was in the circumstances designed to enable Albert and Maisie to remain in the house as long as the first defendant thought fit. If clause 10 were exploited for any other purpose the beneficiaries could complain and the court could find that the first defendant had not properly exercised the discretion conferred on the first defendant to postpone the sale of the house either in the interests of the beneficiaries or in the interests of Albert and Maisie: see *In re Hastings-Bass, decd.* [1975] Ch. 25, 41. In the circumstances which prevailed at the date when the testator made his American will, clause 10 was intended to enable the first defendant to be kind to Albert and Maisie without breach of any duty owed to the beneficiaries.

If the first defendant did not commit a breach of trust of the American will by directing the second defendant to postpone sale, nevertheless Mr. Nugee submits in the second place that the second defendant committed a breach of trust by complying with those directions. The second defendant, he said, was not absolved by clause 10 of the American will. Under the trusts of the Hong Kong will, it was submitted, the second defendant owed a duty to administer the trusts of the house in the interests of the beneficiaries interested in the house under the American will; the second defendant knew that those beneficiaries did not include Albert and Maisie. Their Lordships take

A the view that under the trusts of the Hong Kong will the house was not held by the second defendant on the trusts of the American will. The house was held by the second defendant in trust for the first defendant. If for example Albert and Maisie had predeceased the testator, the power to decide whether the sale of the house should be postponed would have been exercised by the second defendant in accordance with the directions of the first defendant. It would have been for the first B defendant as trustee of the American will to decide whether the house should be retained as an investment or sold and converted into cash available for reinvestment. The trusteeship of the American will cannot be duplicated. The only trustee of the American will was the first defendant. The second defendant owed a duty to the first defendant and not a duty to the beneficiaries under the American will.

C The authorities cited by Mr. Nugee only demonstrate that when a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances a beneficiary may be allowed to sue a third party in the place of the trustee. But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner.

In *Travis v. Milne* (1851) 9 Hare 141, 150, Turner V.-C. observed D that beneficiaries interested in the estate of a deceased partner can only sue the surviving partners in

> "special circumstances . . . where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners."

E

In that case the executors were accused of breach of trust in carrying on business in partnership with the surviving partners and with the capital of the deceased partner. The executors could not prosecute proceedings against the surviving partners without involving themselves in conflicts of interest and duty.

In *Sharpe v. San Paulo Railway Co.* (1873) L.R. 8 Ch.App. 597, F 609–610, James L.J. said:

> "a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the cestui que trust was to file G his bill against the trustee for the execution of the trust, or for the realisation of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this court."

In *Yeatman v. Yeatman* (1877) 7 Ch.D. 210 it was held that a mere H refusal by a personal representative to sue for recovery of a debt owed to the estate would not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the debtor. Hall V.-C., at p. 216, said that the court would have to be satisfied that "it was a

proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful." A

In *Beningfield v. Baxter* (1886) 12 App.Cas. 167, 178–179, Lord Selborne said:

> "When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty." B

In *Meldrum v. Scorer* (1887) 56 L.T. 471, 473, Kay J. considered "it to be quite settled that a mere refusal to sue on the part of a trustee does not entitle a cestui que trust to sue in his own name." A beneficiary C under a settlement inter vivos of a legacy of £8,000 was allowed to sue the personal representatives who, with notice of the settlement, paid the legacy, to one out of two of the settlement trustees and therefore did not obtain a good receipt from the trustees. The sole trustee who had been paid the legacy absconded.

In *Wong Yu Shi v. Wong Ying Kuen (No. 1)* [1957] H.K.L.R. 420 D the estate of a son included a share in the estate of his father. A beneficiary interested in the son's estate obtained an order for an account against the personal representatives of the father and against the personal representatives of the son on the basis of wilful default but only because both sets of personal representatives had been guilty of breaches of trust. E

In *In re Field, decd.* [1971] 1 W.L.R. 555 a plaintiff was allowed to sue on a cause of action vested in personal representatives where the personal representatives refused to sue and there was no one interested in the estate except the plaintiff and the widow of the deceased and the widow had a personal interest in the defeat of the action.

These authorities demonstrate that a beneficiary has no cause of F action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate. By the Hong Kong will the testator conferred on the first defendant the power to give instructions binding on the second defendant to sell or to G retain the Hong Kong house. By clause 10 of the American will the testator relieved the first defendant from any responsibility to the beneficiaries interested in the American estate in respect of the Hong Kong house. As a result of clause 10 the first defendant did not therefore owe any duty to the beneficiaries. The first defendant lawfully instructed the second defendant to postpone sale and the second H defendant lawfully complied with those instructions. Mr. Nugee referred to principles which applied to trusts, bailments, contracts and torts respectively. In the view of their Lordships the principles relied upon

A are not inconsistent with the principles which their Lordships consider to be applicable to the present appeal. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

Solicitors: Slaughter & May; Norton, Rose, Botterell & Roche.

B 5 May. When their Lordships delivered their reserved judgment, counsel for the plaintiffs sought to apply for an order that the costs of the appeal to Her Majesty in Council be paid out of the testator's Hong Kong estate. Their Lordships refused the application.

Lord Templeman said that, unlike the House of Lords, the hearing of an appeal in the Privy Council was a single hearing and counsel C should have raised the matter at the hearing of the appeal while the facts were fresh in the recollection of the court and while any special circumstances could be considered. The remaindermen ought to have been joined. Finally there was no merit in the application.

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[HOUSE OF LORDS]

HOTSON . . . . . RESPONDENT

AND

EAST BERKSHIRE AREA HEALTH AUTHORITY APPELLANTS

1986 Oct. 28, 29; Nov. 14 — Sir John Donaldson M.R., Dillon and Croom-Johnson L.JJ.

1987 May 11, 12, 13; July 2 — Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Mackay of Clashfern, Lord Ackner and Lord Goff of Chieveley

Negligence—Hospital—Failure to diagnose injury—Delay of five days in treatment of injury from fall—Plaintiff suffering permanent disability—25 per cent. chance that plaintiff's disability attributable to hospital's delay in treating injury—Whether plaintiff entitled to damages for loss of chance of good recovery—On balance of probabilities fall causing disability

The plaintiff, then aged 13, fell some 12 feet while climbing a tree and sustained an acute traumatic fracture of the left femoral epiphysis. He was taken to hospital, but his injury was not correctly diagnosed or treated for five days. In the event, he suffered avascular necrosis of the epiphysis, involving disability of the hip joint with the virtual certainty that osteoarthritis would later develop. He brought an action for damages against, inter alia, the defendant health authority, who admitted negligence in failing to diagnose and treat his injury promptly. Simon Brown J. found that even if the health authority had diagnosed the injury correctly and treated the plaintiff promptly there had been a high probability, which he assessed as a 75 per cent. risk, that avascular necrosis would still have developed. He held that the plaintiff was entitled to damages for the loss of the 25 per cent. chance that he would have made a nearly full recovery and awarded him £11,500. The Court of Appeal dismissed an appeal by the health authority.

On appeal by the health authority:—

Held, allowing the appeal, that it had been for the plaintiff to establish on a balance of probabilities that the delay in treatment had at least materially contributed to the development of the avascular necrosis and for the judge to resolve on a balance of probabilities the conflict of medical evidence as to what had caused the avascular necrosis; that the judge's findings of fact were unmistakably to the effect that on a balance of probabilities the plaintiff's fall had left insufficient blood vessels intact to keep the epiphysis alive, which amounted to a finding of fact that the fall had been the sole cause of the avascular necrosis; and that, accordingly, the plaintiff had failed on the issue of causation and no question of quantification had arisen (post, pp. 782C–E, 783C–E, 785C–D, 789H–790A, E, 792C–E, 793C–D, 794B–C).

Per Lord Bridge of Harwich. (i) There are formidable difficulties in the way of accepting the superficially attractive analogy between the principle applied in cases of damages for a lost chance in actions based on contract or tort and the principle

of awarding damages for the lost chance of avoiding personal injury or, in medical negligence cases, for the lost chance of a better medical result which might have been achieved by prompt diagnosis and correct treatment, but the present appeal is not a suitable occasion for reaching a settled conclusion (post, pp. 782G—783A).

(ii) If the plaintiff had proved on a balance of probabilities that the authority's negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, no principle of English law would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed (post, p. 783A–B).

Per Lord Mackay of Clashfern. It would be unwise in the present case to lay it down as a rule that a plaintiff could never succeed by proving loss of a chance in a medical negligence case (post, p. 786A).

Per Lord Ackner. The debate on the loss of a chance cannot arise where there has been a positive finding that before the duty arose the damage complained of had already been sustained or had become inevitable (post, p. 792G). Once liability is established on the balance of probabilities, the loss which the plaintiff has sustained is payable in full. It is not discounted by reducing his claim by the extent to which he has failed to prove his case with 100 per cent. certainty (post, p. 793F).

Decision of the Court of Appeal, post, pp. 754H—755A; [1987] 2 W.L.R. 287; [1987] 1 All E.R. 210 reversed.

The following cases are referred to in their Lordships' opinions:

Bagley v. North Herts Health Authority (1986) 136 N.L.J. 1014
Bonnington Castings Ltd. v. Wardlaw [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615, H.L.(E.)
Chaplin v. Hicks [1911] 2 K.B. 786, C.A.
Hamil v. Bashline (1978) 481 Pa. 256; 392 A.2d 1280
Herskovits v. Group Health Cooperative of Puget Sound (1983) 664 P.2d 474
Hicks v. United States (1966) 368 F.2d 626
Kenyon v. Bell, 1953 S.C. 125
Kitchen v. Royal Air Force Association [1958] 1 W.L.R. 563; [1958] 2 All E.R. 241, C.A.
Lavender v. Kurn (1946) 327 U.S. 645
McGhee v. National Coal Board [1973] 1 W.L.R. 1; [1972] 3 All E.R. 1008, H.L.(Sc.)
Mallett v. McMonagle [1970] A.C. 166; [1969] 2 W.L.R. 767; [1969] 2 All E.R. 178, H.L.(N.I.)

The following additional cases were cited in argument in the House of Lords:

Barnett v. Chelsea and Kensington Hospital Management Committee [1969] 1 Q.B. 428; [1968] 2 W.L.R. 422; [1968] 1 All E.R. 1068
Clark v. Kirby-Smith [1964] Ch. 506; [1964] 3 W.L.R. 239; [1964] 2 All E.R. 835
Cork v. Kirby Maclean Ltd. [1952] 2 All E.R. 402, C.A.
Cutler v. Vauxhall Motors Ltd. [1971] 1 Q.B. 418; [1970] 2 W.L.R. 961; [1970] 2 All E.R. 56, C.A.

Davies v. Taylor [1974] A.C. 207; [1972] 3 W.L.R. 801; [1972] 3 All E.R. 836, H.L.(E.)

Dunbar v. A. & B. Painters Ltd. [1986] 2 Lloyd's Rep. 38, C.A.

Everett v. Hogg, Robinson & Gardner Mountain (Insurance) Ltd. [1973] 2 Lloyd's Rep. 217

Eyre v. Measday [1986] 1 All E.R. 488, C.A.

Gauntlett v. Northampton Health Authority (unreported), 12 December 1985; Court of Appeal (Civil Division) Transcript No. 835 of 1985, C.A.

Hawkins v. New Mendip Engineering Ltd. [1966] 1 W.L.R. 1341; [1966] 3 All E.R. 228, C.A.

Ketteman v. Hansel Properties Ltd. [1987] A.C. 189; [1987] 2 W.L.R. 312, H.L.(E.)

London & North Eastern Railway Co. v. B.A. Collieries Ltd. [1945] A.C. 143; [1945] 1 All E.R. 51, H.L.(E.)

McWilliams v. Sir William Arrol & Co. Ltd. [1962] 1 W.L.R. 295; [1962] 1 All E.R. 623, H.L.(Sc.)

Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 384; [1978] 3 W.L.R. 167; [1978] 3 All E.R. 571

Mulvaine v. Joseph (1968) 112 S.J. 927

Otter v. Church, Adams, Tatham & Co. [1953] Ch. 280; [1953] 1 W.L.R. 156; [1953] 1 All E.R. 168

Robinson v. Post Office [1974] 1 W.L.R. 1176; [1974] 2 All E.R. 737, C.A.

Saif Ali v. Sydney Mitchell & Co. [1980] A.C. 198; [1978] 3 W.L.R. 849; [1978] 3 All E.R. 1033, H.L.(E.)

Sykes v. Midland Bank Executor and Trustee Co. Ltd. [1971] 1 Q.B. 113; [1970] 3 W.L.R. 273; [1970] 2 All E.R. 471, C.A.

Thake v. Maurice [1986] Q.B. 644; [1986] 2 W.L.R. 337; [1986] 1 All E.R. 497, C.A.

Wathen v. Vernon [1970] R.T.R. 471, C.A.

The following cases are referred to in the judgments of the Court of Appeal:

Barnett v. Chelsea and Kensington Hospital Management Committee [1969] 1 Q.B. 428; [1968] 2 W.L.R. 422; [1968] 1 All E.R. 1068

Bonnington Castings Ltd. v. Wardlaw [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615, H.L.(E.)

Chaplin v. Hicks [1911] 2 K.B. 786, C.A.

Davies v. Taylor [1974] A.C. 207; [1972] 3 W.L.R. 801; [1972] 3 All E.R. 836, H.L.(E.)

Kenyon v. Bell, 1953 S.C. 125

Kitchen v. Royal Air Force Association [1958] 1 W.L.R. 563; [1958] 2 All E.R. 241, C.A.

Krantz v. McCutcheon (1920) 18 Ontario W.N. 395

McGhee v. National Coal Board [1973] 1 W.L.R. 1; [1972] 3 All E.R. 1008, H.L.(Sc.)

McWilliams v. Sir William Arrol & Co. Ltd. [1962] 1 W.L.R. 295; [1962] 1 All E.R. 623, H.L.(Sc.)

Mallett v. McMonagle [1970] A.C. 166; [1969] 2 W.L.R. 767; [1969] 2 All E.R. 178, H.L.(N.I.)

Marbe v. George Edwards (Daly's Theatre) Ltd. [1928] 1 K.B. 269, C.A.

Robinson v. Post Office [1974] 1 W.L.R. 1176; [1974] 2 All E.R. 737, C.A.

Seward v. Vera Cruz (Owners) (The Vera Cruz) (1884) 10 App.Cas. 59, H.L.(E.)

Sykes v. Midland Bank Executor and Trustee Co. Ltd. [1971] 1 Q.B. 113; [1970] 3 W.L.R. 273; [1970] 2 All E.R. 471, C.A.
Vyner v. Waldenberg Brothers Ltd. [1946] K.B. 50, C.A.

The following additional cases were cited in argument in the Court of Appeal:

Cook v. Swinfen [1967] 1 W.L.R. 457; [1967] 1 All E.R. 299, C.A.
Cork v. Kirby Maclean Ltd. [1952] 2 All E.R. 402, C.A.
Cutler v. Vauxhall Motors Ltd. [1971] 1 Q.B. 418; [1970] 2 W.L.R. 961; [1970] 2 All E.R. 56, C.A.
Eyre v. Measday [1986] 1 All E.R. 488, C.A.
Fraser v. B. N. Furman (Productions) Ltd. [1967] 1 W.L.R. 898; [1967] 3 All E.R. 57, C.A.
Gauntlett v. Northampton Health Authority (unreported), 12 December 1985; Court of Appeal (Civil Division) Transcript No. 835 of 1985, C.A.
Lim Poh Choo v. Camden and Islington Area Health Authority [1980] A.C. 174; [1979] 3 W.L.R. 44; [1979] 2 All E.R. 910, H.L.(E.)
Mulvaine v. Joseph (1968) 112 S.J. 927
Saif Ali v. Sydney Mitchell & Co. [1980] A.C. 198; [1978] 3 W.L.R. 849; [1978] 3 All E.R. 1033, H.L.(E.)
Wathen v. Vernon [1970] R.T.R. 471, C.A.

APPEAL from Simon Brown J.

By a writ issued in the Reading District Registry on 10 September 1979, and amended on 28 January 1981, the plaintiff, Stephen John Hotson, an infant, by his father and next friend, Cyril Arthur Hotson, claimed damages against the first to third defendants, M. V. J. Fitzgerald, D. Goldstein and R. J. Habershon, respectively and against East Berkshire Health Authority, the health authority, for their breach of statutory duty and/or negligence and/or breach of an implied duty to take reasonable care and skill in their general medical treatment, attendance and advice on the plaintiff from October 1976 until May 1977.

By an amended statement of claim dated 15 January 1983, the plaintiff claimed that on 26 April 1977 while at school he fell 12 feet from a tree, suffered considerable pain and was unable to take his weight on his left leg. He attended St. Luke's Hospital, Maidenhead, a few hours later. The next morning he attended the surgery of the first three defendants, presenting himself to the second defendant. The pain in his left leg persisted to such an extent that on 1 May 1977 his father took him back to the hospital, he was X-rayed and found to be suffering from a displacement of the left epiphysis which was operated on on 2 May 1977 at Heatherwood Hospital, Ascot. The plaintiff now suffered from a permanent deformity of the left hip, loss of movement there and wasting of the left leg with a resultant limp. He would not have suffered any of those injuries but for the defendants' negligence and/or breach of duty. The plaintiff suffered pain and injury, inconvenience, loss of amenity and loss of future earning capacity, and claimed damages against one or other of each of the defendants.

Prior to the hearing, the health authority admitted breach of duty in the conduct of the examination of the plaintiff on 26 April 1977 so that

his condition was not correctly diagnosed until 1 May 1977. The claim for damages proceeded against the health authority only.

On 15 March 1985, Simon Brown J. [1985] 1 W.L.R. 1036 gave judgment for the plaintiff and awarded him £11,500 for the loss of a 25 per cent. chance of recovery from his injury, and £150 for pain and suffering for the five days delay in treatment.

By notice of appeal dated 3 April 1985, the health authority appealed on the grounds that, given the findings of fact made by the judge, he misdirected himself (i) in awarding damages for loss of a less than 50 per cent. chance of avoiding personal injury; (ii) in awarding damages in respect of such injury although the plaintiff had failed to prove on the balance of probability that but for the breach of duty he would not have sustained it; (iii) in classifying a problem of proof of causation of damage as one of quantification of damages; (iv) in holding that loss of a 25 per cent. chance of recovery only could attach to or be parasitical upon and thus by implication form part of the quantification of damages for quite separate consequences of the breach of duty, i.e. five days extra pain and suffering; (v) in holding that the plaintiff had discharged a burden of proof which entitled him to damages (albeit discounted by 75 per cent.) in respect of the lost chance of avoiding avascular necrosis and its consequences.

By respondent's notice dated 23 April 1985, the plaintiff gave notice of his intention to contend that the judge's judgment be affirmed on the additional ground that if, which was denied, the judge misdirected himself in classifying a problem of causation of damage as one of quantification of damages, the plaintiff was still entitled to succeed on his claim because the evidence accepted by the judge established a causative connection between the health authority's admitted breach of duty and the loss of the chance of full or substantial recovery from his injury. The plaintiff also gave notice of his intention to contend that the award of £11,650 should be varied in any event by substituting therefor an award of £27,750 on the grounds that the judge misdirected himself in failing to accept the plaintiff's expert evidence that, had he been promptly treated, there was a smaller than 50 per cent. chance of developing avascular necrosis at all, and that, even if he had developed avascular necrosis, there was a small chance that given prompt treatment it would have been less than total; had the judge accepted that evidence he would or should have awarded the plaintiff damages discounted by only 40 per cent. in respect of the loss of chance of avoiding avascular necrosis and its consequences; the sum awarded would then have been 60 per cent. of £46,000, i.e., £27,600, together with the £150, not appealed against, for pain and suffering, making a total of £27,750.

By notice dated 1 May 1985, the plaintiff discontinued his action against the first three defendant doctors.

The facts are stated in the judgment of Sir John Donaldson M.R.

Adrian Whitfield Q.C., Kieran Coonan and *Andrew Grubb* for the health authority.

Graeme Williams Q.C. and *David Ashton* for the plaintiff.

Cur. adv. vult.

14 November. The following judgments were handed down.

A SIR JOHN DONALDSON M.R. This appeal appears to raise a novel point on damages in the law of tort. More specifically, "Can a plaintiff recover damages in negligence for the loss of a chance or loss of opportunity?" In this case the problem arises in the context of medical negligence, but it could arise in many other contexts.

The facts can be briefly stated. Stephen Hotson, then aged 13, was at school on 26 April 1977. He fell from a rope on which he had been swinging. He dropped some 12 feet on to muddy ground, landing on his seat. Despite the softness of the ground, the shock was sufficient to cause him to suffer an acute traumatic fracture separation of the left femoral epiphysis. This is a very serious injury in a child of this age, as the judge, Simon Brown J. [1985] 1 W.L.R. 1036, 1038–1039, explained:

> "The femoral epiphysis (the epiphysis as I shall refer to it henceforth) is the spongy extremity of the upper femur, its surface being covered with cartilage, which slots into the cavity of the acetabulum to form the hip joint. In a child the epiphysis is connected to the neck of the femur by an epiphysial plate (sometimes called a growth plate) which is essentially a sandwich filling of cartilage between, on the upper side, the epiphysis and on the lower side the bony femoral neck. The plate exists only in a growing skeleton and indeed it enables the bone to grow; in maturity it forms bone across the gap. The major threat created by an injury such as the plaintiff's is that it will so interfere with the blood supply to the epiphysis that avascular necrosis will develop. This is a condition whereby through lack of sufficient blood the epiphysis becomes de-mineralized, weakened and softened and thus denser, distorted and deformed. When that occurs, not only does it cause misshapenness of the joint with associated pain, restriction in mobility and general disability, but it also carries with it the virtual certainty that osteo-arthritis will develop within the joint."

The unfortunate plaintiff has indeed suffered avascular necrosis of the epiphysis with consequential serious disabilities which will become more serious over the years. In money terms the judge has assessed these disabilities as £46,000. Since this figure is not now in dispute, I need not detail the disabilities or how the sum is made up.

I now come to the admitted negligence of the defendant health authority. Shortly after the accident the plaintiff was taken to St. Luke's Hospital, Maidenhead, and examined. His left knee was X-rayed and showed no injury. For some unexplained reason, there was no X-ray examination of his femur or hip. He was given an elastic knee bandage and told to return in ten days, if necessary. I draw a veil over the next five days, during which the plaintiff suffered excruciating pain and received scant sympathy and no real treatment from his general practitioner. That doctor and his partners were additional defendants, but that aspect of the matter was settled. Happily, on 1 May 1977 the plaintiff was taken back to St. Luke's, where he was re-examined and his hip X-rayed. This revealed the true nature and extent of the injury and led to emergency treatment by traction and by manipulation under

general anaesthetic, coupled with the reduction and pinning of the fracture.

It was common ground that the neglect to diagnose and treat the plaintiff's injury caused him avoidable pain and suffering for the five days between 26 April and 1 May. For this the judge awarded the very modest sum of £150, in respect of which there is no appeal. What is in dispute is whether he is entitled to any further damages. This turns upon the long term effects of the delay in diagnosis and treatment. On this there was a conflict of medical evidence which reflects the fact that, whilst all or most surgeons would regard immediate treatment as essential, if only to relieve pain, there is no certainty that immediate treatment will avoid avascular necrosis with consequential disability.

The judge made four findings of fact, which are accepted by the defendant area health authority. They are as follows [1985] 1 W.L.R. 1040–1041:

> "(1) Even had the health authority correctly diagnosed and treated the plaintiff on 26 April there is a high probability, which I assess as a 75 per cent. risk, that the plaintiff's injury would have followed the same course as it in fact has, that is, he would have developed avascular necrosis of the whole femoral head with all the same adverse consequences as have already ensued and with all the same adverse future prospects. (2) That 75 per cent. risk was translated by the health authority's admitted breach of duty into an inevitability. Putting it the other way, their delay in diagnosis denied the plaintiff the 25 per cent. chance that, given immediate treatment, avascular necrosis would not have developed. (3) Had avascular necrosis not developed, the plaintiff would have made a very nearly full recovery. (4) The reason why the delay sealed the plaintiff's fate was because it allowed the pressure caused by haemarthrosis—the bleeding of ruptured blood vessels into the joint—to compress and thus block the intact but distorted remaining vessels with the result that even had the fall left intact sufficient vessels to keep the epiphysis alive (which, as finding (1) makes plain, I think possible but improbable) such vessels would have become occluded and ineffective for this purpose."

Having reviewed the authorities, the judge reached four conclusions of law, at p. 1050:

> "(1) If the plaintiff proves both medical negligence and that he has thereby (a) lost a substantial chance of achieving a better medical result, alternatively, (b) incurred a substantial risk of an adverse medical result developing, he is entitled to damages. (2) If the extent of that proved loss of chance or risk is clearly unascertainable, then the plaintiff is entitled to recover damages in full. (3) The extent of the loss of chance or risk should, however, be ascertained if possible and the plaintiff's damages be calculated and discounted accordingly. (4) Generally speaking the plaintiff will be required to establish a higher degree of substantiality in order to succeed on basis (2) than on basis (3); even on basis (3) the court will look for a higher degree of substantiality when the claim is not attached to a

directly provable period of suffering or disability, particularly a serious one, than when it is."

These conclusions are not accepted.

Combining fact and law, Simon Brown J. awarded the plaintiff £11,650, being the £150 for pain and suffering, together with £11,500, or 25 per cent. of the full liability figure of £46,000. The defendant health authority now appeals.

The essence of the defendants' argument is that the standard of proof in civil proceedings is the balance of probabilities. In percentage terms, where it is alleged that an event, act or omission has occurred, he who alleges it must satisfy the court that it is more than 50 per cent. likely that it occurred. In the instant case the plaintiff only proved that it was 25 per cent. likely that the delay in diagnosing and treating his injury permitted the avascular necrosis to occur. Accordingly he cannot establish that *any* loss flowed from the delay and cannot recover damages based upon it. As a subsidiary argument, the defendants contend that even though, as is the case, it is possible to sue in contract for the loss of a chance, no such claim in tort has ever been recognised.

The principal argument has a superficial attraction. This attraction stems from its simplicity and the fact that it is undoubtedly based upon well settled principles of law. So far as past happenings are concerned, the court does indeed approach the matter on the basis that if it is 50 per cent. or less likely to have happened, it did not happen and that if it is more than 50 per cent. likely, it did. In general it is only in relation to future happenings, its view of which must inevitably be more or less speculative, that it translates likelihood into what might be described as partial or discounted findings of fact.

If authority for these principles were needed, it is to be found in the speech of Lord Diplock in *Mallett v. McMonagle* [1970] A.C. 166, 176:

> "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

This is supported by a passage from the speech of Lord Reid in *Davies v. Taylor* [1974] A.C. 207, 212–213, where he said:

> "When the question is whether a certain thing is or is not true—whether a certain event did or did not happen—then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a

balance in favour of it having happened then it is proved that it did in fact happen. But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent.: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent. and a probability of 49 per cent."

Applying that approach to the judge's findings of fact, Mr. Whitfield, for the defendants, submits that no causal connection between the negligence and the development of avascular necrosis and consequent disability has been established, since a 25 per cent. likelihood fails to achieve the requisite standard of proof. Without that causal connection, there can be no liability in damages based upon that development. In more concrete terms, it is all, i.e. £46,000, or nothing—£46,000 if the likelihood of the connection exceeds 50 per cent. and otherwise nothing. In the instant case it is nothing.

In Mr. Whitfield's submission, damages in respect of a lost chance are recoverable only where the defendant breaks a contract under which the plaintiff was entitled to a chance or where chances are relevant to *valuing* an injury proved to result from the defendant's breach of duty. An example of a successful contractual claim for damages for the loss of a chance is provided by *Chaplin v. Hicks* [1911] 2 K.B. 786, where an entrant in a beauty competition was not notified of the date of the final and so lost the chance of a prize. Examples of valuing an injury on the basis of the chance of its proving more or less severe are, of course, legion.

The only authority directly in point is *Kenyon v. Bell,* 1953 S.C. 125, where Lord Guthrie held, in preliminary proceedings as to the relevancy, that an averment that negligent medical treatment caused the loss of an eye was a good plea, but that an alternative averment that the treatment led to the loss of the chance of saving an eye was not. Lord Guthrie considered various reported decisions but, holding that they did not assist, expressly based his decision upon "the general principles of the law of reparation" and quoted with approval a dictum of Master J. in *Kranz v. McCutcheon* (1920) 18 Ontario W.N. 395 that: "The rule against the recovery of uncertain damages is directed against uncertainty as to cause rather than as to the extent or measure." This authority certainly supports the defendants' argument, but is not binding upon this court. As will appear, I do not think that it represents the law of England.

Mention must also be made of another Scottish authority, this time in the House of Lords. In *McGhee v. National Coal Board* [1973] 1 W.L.R. 1, a workman was necessarily exposed to brick dust in the course of his employment. His employers were in breach of a statutory duty to provide adequate washing facilities at his place of work. The

brick dust caused damage to the skin and the extent of the damage, and the seriousness of the consequences, depended in part upon how long the dust was allowed to remain in contact with the skin. The Scottish courts held that the workman could not succeed unless he could prove, on the balance of probabilities, that the provision of washing facilities at the work place and their use by him would have prevented him being afflicted with dermatitis. The House of Lords held that it sufficed if the workman could show that, on the balance of probabilities, the lack of washing facilities contributed materially to the occurrence of the dermatitis and followed its own decision in *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613. However, the decision in *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 is remarkable, in the literal sense of the word, for passages in the speeches of Lord Reid, at pp. 4G–5B, Lord Wilberforce, at p. 7E–F, Lord Simon of Glaisdale, at pp. 8D–9B, and Lord Salmon, at pp. 12F–13A, which might suggest that where an employer is in breach of statutory duty and injury is suffered which that duty was designed to avoid, but, in the current state of medical knowledge it is impossible to prove how effective the statutory precaution would have been in a particular case, the burden of proof is reversed and it is for the employer to prove that there was no causal connection. Perhaps a more orthodox interpretation of this decision is that where a statutory duty is admittedly aimed at a particular mischief, that duty is broken and the mischief occurs, there is a prima facie inference of causation. However that may be, it is clear that no one suggested that it was possible to assess the likelihood that the provision of washing facilities would have prevented or reduced the severity of the dermatitis and that damages should be awarded on the basis of a discount reflecting such likelihood.

In the instant appeal the plaintiff gave notice of a contention that the award of damages should be increased to £27,600, being 60 per cent. of full liability, but at no time has he abandoned his basic claim that the delay in diagnosis and treatment deprived him of a chance of avoiding the disability from which he suffers and that any award of damages should reflect this chance. Nor has he put forward an alternative claim for full liability based upon (a) accepting the defendants' arguments and contending that the likelihood of avoiding the disability exceeded 50 per cent. or (b) claiming that on some reasoning based upon, or analogous to, that of *McGhee's* case, it should be held that the delay made a material contribution to the disability. Having mentioned the respondent's notice, albeit in a different context from pure quantum, it may be convenient to say that I can see no basis upon which we could differ from the judge's assessment of the likelihood of timeous treatment having been successful and I would dismiss the cross-appeal.

I return therefore to the problem of liability. As a matter of common sense, it is unjust that there should be no liability for failure to treat a patient, simply because the chances of a successful cure by that treatment were less than 50 per cent. Nor, by the same token, can it be just that if the chances of a successful cure only marginally exceed 50 per cent., the doctor or his employer should be liable to the same extent as if the

treatment could be guaranteed to cure. If this is the law, it is high time that it was changed, assuming that this court has power to do so.

Equally I am quite unable to detect any rational basis for a state of the law, if such it be, whereby in identical circumstances Dr. A who treats a patient under the National Health Service, and whose liability therefore falls to be determined in accordance with the law of tort, should be in a different position from Dr. B who treats a patient outside the service, and whose liability therefore falls to be determined in accordance with the law of contract, assuming, of course, that the contract is in terms which impose upon him neither more nor less than the tortious duty.

The answer I think lies in examining precisely what the plaintiff has to allege and prove. First, he has to prove a duty. This is no problem in this case, since it is admitted. But for that admission, it would have been necessary to establish the duty, the necessary factual basis being proved on the balance of probabilities. I say that because there is no room in either justice or law for holding a defendant liable on the basis that he *may* have been subject to a duty. Either he was or he was not. Second, the plaintiff has to prove a breach of that duty. Here again there is no problem, since the failure to treat the plaintiff properly on the occasion of his first visit to the hospital admittedly constituted a breach of that duty. But if this breach had had to be established, any necessary facts would have had to have been proved on the balance of probabilities. Again I say this because there is no room in justice or law for holding a defendant liable on the basis that there is a significant possibility, not amounting to a probability, that he was in breach of his duty. Third, in the case of tort but not of contract, the plaintiff has to prove some loss or damage and must do so on the balance of probabilities. It is this third requirement which requires further analysis. Hereafter, for simplicity, I will refer to "loss or damage" simply as "loss."

The distinction between what must be proved in contract and what must be proved in tort in order to establish a cause of action may be regrettable, but it does not lie within the power of this court to do anything about it. In any event, it is not usually of practical importance, save perhaps in the context of limitation where the loss necessary to complete the cause of action in tort occurs a significant time after the breach of duty. Even in contract, if more than a bare right of action is to be established, the plaintiff must prove a loss of substance and, once again, this must be proved on the balance of probabilities. Having identified and proved that loss, the loss has then to be valued. Identification and valuation are distinct and separate processes, but, pace *McGhee v. National Coal Board* [1973] 1 W.L.R. 1, it is for the plaintiff to prove both the identified loss and its value and to do so in each case on the balance of probabilities.

In the instant case the plaintiff has no difficulty in identifying the loss upon which he relies. It has been described by the judge as "a substantially increased risk that avascular necrosis would develop and long term disability result" and in argument as "the chance of avoiding avascular necrosis and its consequences." I think it is the use of the latter description with its reference to *chances,* which has complicated

what is essentially a simple claim: I say that because the use of the word "chance" imports probabilities and opens the way to the argument put forward by the defendants. I also think that it is inaccurate, because it elides the identification of the loss with the valuation of that loss and they are distinct processes.

In my judgment the essence of the plaintiff's claim is that he has lost any *benefit* which he would have derived if, on the occasion of his first visit to the hospital, he had received the treatment which he in fact received on the occasion of his second visit. This loss of benefit is, of course, admitted, since it flows inexorably from the admission of negligence. Furthermore, it is admitted that it had some value, namely that earlier treatment would have reduced the period over which the plaintiff would have been in pain. Whether it had any further value was in issue. However, if it had been necessary to prove that earlier treatment constituted any benefit, this would have had to have been done on the balance of probabilities.

Mr. Whitfield, for the defendants, seeks to escape from the consequences of this analysis by submitting that it really cannot make any difference that, in this particular case, the plaintiff can prove that loss of the benefit of early treatment undoubtedly led to pain and suffering, which is a proper subject matter for damages in tort. The real issue is whether, viewed in isolation, the loss of the benefit of early treatment in relation to avascular necrosis and its consequences sounds in damages, when all that can be proved is that there was a chance that it would have been successful. With this I agree. In Mr. Whitfield's submission it does not sound in damages because damages in tort are confined to compensating proved financial or physical losses and the loss of a chance is neither.

It has been said times without number that the categories of negligence are never closed and, subject to the rules relating to remoteness of damage which are not material in the instant case, I can see no reason why the categories of loss should be closed either.

If the plaintiff can rely upon the loss of the *benefit* of timeous treatment, he has still to satisfy the court as to the value of this benefit and once again he must do this on the balance of probabilities. He did this in three stages. First, he identified, and proved to this standard, that the benefit which he had lost was a one in four chance of avoiding avascular necrosis. Second, he established, again on the balance of probabilities, that the long term disability from which he is suffering was to be valued at £46,000. Third, he submitted, and the judge accepted, that a one in four chance of avoiding this loss was worth one-quarter of the value of the loss itself. I am not sure that this necessarily follows, although it is no doubt a convenient approach. There could, I think, be circumstances in which the "worst case" was either relatively trivial or, alternatively, was so dire that in the first case a one in four chance of avoidance would be worth less than, and in the second case would be worth far more than, 25 per cent. of the "worst case" value. However, there was no challenge to this proportionate approach either here or below.

Mr. Whitfield also submitted that this approach led to a number of anomalous results.

(a) Damages for a lost chance or increased risk will be recoverable in all negligence actions

By this I think Mr. Whitfield meant that proportionate awards of damages will be recoverable in all negligence actions. Not so. Usually the duty will not confer upon the plaintiff the benefit of a chance, but of a certainty. And even when it confers a chance, breach of that duty will only lead to a proportionate award where it is impossible to determine what would have been the consequences of the plaintiff being given that chance, although possible to determine the likelihood of particular consequences. Take the case of a solicitor who fails to advise his client that the property which he is about to purchase is subject to a right of way. If the client had been told, he would or he would not have gone ahead with the transaction. That would have been *his* choice, not the choice of fate. Ascertaining what his choice would have been is possible, whereas the prospects for a cure of a particular patient are sometimes not. The damages recoverable by the solicitor's client would therefore be all or nothing, depending upon whether he could prove, on the balance of probabilities, that he would have abandoned the transaction.

(b) *Time will start to run when a chance is lost or a risk is increased, not when physical injury is sustained*

This is no more anomalous than the difference between limitation where the claim is founded in contract and where it is founded in tort. In any event, it is not a case of the cause of action being brought forward in point of time. All that is involved is that different causes of action may have different starting points when calculating periods of limitation.

(c) *Plaintiffs who are deprived of a chance of recovery or exposed to a chance of injury will have a right of action even if they remain uninjured in the event*

This may be correct, but it is not of practical consequence, since the loss suffered will be nil and, at best, only nominal damages will be recoverable.

(d) *Where there is a negligent failure to diagnose and treat in a way which would have given a 25 per cent. increased chance of survival, the patient would recover damages subject to a 75 per cent. discount, but his dependants would obtain no award under the Fatal Accidents Act 1976 because they could not prove that the negligence caused the death*

This may be regarded as an anomaly, but it stems from the wording of the statute: "If death is caused by any wrongful act, neglect or default." I do not regard this anomaly, if such it be, as throwing any light on the problem with which we are concerned.

It will be seen that I entirely agree with the judge's first conclusion of law, but have reservations about the remainder which are, I think, based upon *McGhee v. National Coal Board* [1973] 1 W.L.R. 1, an authority which I have had some difficulty in understanding.

For the reasons which I have sought to express, I agree that the plaintiff was entitled to the award of damages made by the judge and I would dismiss the appeal.

Dillon L.J. It is well established that in an appropriate factual and legal context a plaintiff can recover damages for the loss of a chance, where the wrongful act of the defendant has deprived the plaintiff of a chance of achieving some benefit, even though the chance was less than a 50 per cent. chance, provided that it was not minimal or, as it has been put, a mere speculative possibility: see, for instance, *Chaplin v. Hicks* [1911] 2 K.B. 786, where the defendant had contracted that the plaintiff should have a chance of competing for a theatrical engagement, and he broke his contract; and *Davies v. Taylor* [1974] A.C. 207 where the court considered what expectation of financial benefit had to be shown by a dependant claiming under the Fatal Accidents Acts 1846–1959.

In *Chaplin v. Hicks,* no one could ever know whether, but for the defendant's wrongful act, the plaintiff would have been successful in the competition. But for his act, however, she would have had the chance of competing; by his act she was deprived of that chance and for that chance, and not for any probability of success, she was compensated by an award of damages. In the present case, when the plaintiff was taken to St. Luke's Hospital on 26 April 1977, he had, on the judge's findings, a 25 per cent. chance that by prompt treatment the development of avascular necrosis of the left femoral epiphysis, with all its serious consequences, could be avoided. When he left the hospital to return home that day he had lost that chance as a result of the breach of duty on the part of the doctor, for whom the defendants are responsible, in conducting his examination of the plaintiff that day. As a result of the doctor's negligence, there was no prompt treatment and so we can never know how the chance would have turned out had the examination of the plaintiff not been negligent. Why then should not the plaintiff be compensated by damages for the loss of that chance?

The answer given by Mr. Whitfield, for the defendants, is that the plaintiff's cause of action lies in tort and not in contract, and in tort, unlike contract, damage caused to the plaintiff by the defendant's wrongful act is an essential ingredient of the cause of action. Mr. Whitfield refers to various statements of principle of high authority, such as the reference by Viscount Kilmuir L.C. in *McWilliams v. Sir William Arrol & Co. Ltd.* [1962] 1 W.L.R. 295, 299, to the necessity, in actions of negligence, of establishing not only the breach of duty but also the causal connection between the breach and the injury complained of, and the statement by Lord Diplock in *Mallet v. McMonagle* [1970] A.C. 166, 176F, that the court decides questions of fact on the balance of probabilities and treats as certain anything that is more probable than not. Adding these two together, Mr. Whitfield submits that the plaintiff cannot recover anything against the defendants because, on the judge's findings, he does not show that but for the doctor's negligence there was a more than 50 per cent. chance—a balance of probabilities—that

avascular necrosis would have been avoided by prompt treatment on 26 April.

Medicine does not deal only in certainties. In that, no doubt, medicine is not unique, but there are very many cases in which the patient, who goes to a doctor, has only a chance, be it greater or less, of being cured of his ailment, or only a chance of avoiding a further deterioration in his condition. If Mr. Whitfield is right, and the chance is lost through a negligent failure of the doctor to examine the patient properly or to diagnose correctly, with the result that the treatment which alone might have saved the patient is not undertaken, the patient will have no remedy unless he can show that the chance of the treatment, if undertaken, proving successful was more than 50 per cent. That to my mind is contrary to common sense.

The fundamental question is what is the damage which the plaintiff has suffered? Is it the onset of the avascular necrosis or is it the loss of the chance of avoiding that condition? In my judgment, it is the latter. I see no reason why the loss of a chance which is capable of being valued should not be capable of being damage in a tort case just as much as in a contract case such as *Chaplin v. Hicks* [1911] 2 K.B. 786. If that is right, there is no difficulty over causation. Causation—that the damage was caused by the wrongful act of the defendant—has to be proved on the balance of probabilities, but by that standard of proof it was amply proved in the present case that the chance which the plaintiff on the judge's findings had had was lost by the admitted negligence of the doctor.

The position would have been different if, as in *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428, the finding on the facts on the balance of probabilities had been that had all care been taken still the patient would have suffered the same result. In that event there would, on the facts, have been no chance and the plaintiff would thus have suffered no damage from the negligence. The defendants' witness, Mr. Bonney, said, in part of his evidence, that there was no chance and that in this plaintiff's case, whatever statistics may show, avascular necrosis was inevitable. But the judge did not accept that evidence of Mr. Bonney. The judge found that there was a significant chance, though less than 50 per cent. That chance the plaintiff has lost through the negligence of the doctor for whom the defendants are responsible. The plaintiff has thereby suffered damage for which he is entitled to be compensated. I would accordingly dismiss this appeal.

As to the cross-appeal, whereby the plaintiff seeks to establish that the chance which he lost of avoiding avascular necrosis was a 60 per cent., and not merely a 25 per cent., chance, I see no justification for interfering with the judge's finding, much as I sympathise with the plaintiff. The judge had before him two expert witnesses, Mr. Bonney and Mr. Bucknill, neither of whose evidence was very satisfactory on this point. There were internal inconsistencies in Mr. Bonney's evidence on the point, while Mr. Bucknill's—which was difficult to follow because it did not appear until a late stage that he drew a fundamental distinction between a probability and a likelihood—did not persuade the judge.

A The judge had to form his own view, and this court, which has not seen either witness, could not reach any different conclusion.

Croom-Johnson L.J. On 26 April 1977 the plaintiff, then aged 13, suffered an injury to his hip joint when he fell from a rope at school. He suffered from an acute fracture separation of the left femoral epiphysis. B He was taken to St. Luke's Hospital, Maidenhead. His left knee was X-rayed, but not the hip. He was sent home. On 1 May, after several days of intense pain, he was sent back to St. Luke's, where further X-rays were taken, this time of the hip. The fracture was diagnosed, and he was put on traction. On 2 May the hip was operated on. The defendants admitted that the failure to diagnose and treat the fracture on 26 April and until 2 May was a breach of duty. For the six days' pain and C suffering the judge awarded £150. The whole question in this appeal has concerned the long-term results.

The plaintiff's injury was undoubtedly serious, particularly in a growing boy, and a serious one of its type. It was one from which the prospects of recovery are poor. He now has a grievously and permanently disabled leg, which is shortened. There were agreed medical reports D from a Mr. Westcombe which describes the present condition and the deterioration both of his leg and back which may be expected to take place in the future. These reports formed the ground on which damages for the leg injury were assessed on a full liability basis.

The East Berkshire Health Authority became the only effective defendants. The other defendants were the doctors in the partnership practice who attended to the plaintiff during the six days between the E hospital visits. The plaintiff discontinued against them, and they fall out of the story.

The case was brought in negligence. The amended statement of claim alleged that the present injuries to the plaintiff resulted from the negligence in failing to carry out a proper diagnosis on 26 April 1977. In view of the course which the case took at trial, it is necessary to set out what needed to be proved. F

This is an action on the case. The plaintiff, in order to succeed, had first to establish a breach of duty. This was admitted by the defendants. He then had to prove damage, which was the gist of the action, and that each of the heads of damages was caused by the breach of duty. All these had to be proved by the normal standards of proof in civil liability, on at least a balance of probabilities. In *Bonnington Castings Ltd. v.* G *Wardlaw* [1956] A.C. 613 it was held that the breach of duty must be proved to have caused or contributed to the damage, and if there is more than one cause the contribution may be less than half so long as it is material. That case also overruled *Vyner v. Waldenberg Bros. Ltd.* [1946] K.B. 50 in so far as it laid down that in actions based on breaches of statutory duty the onus of proof is reversed.

How the onus of proof is discharged will vary. It may depend on H direct oral evidence, on inferences to be drawn from proved facts, on expert opinion, or in other ways. In appropriate cases, where a recognised precaution is not taken and injury is suffered of the kind which that precaution is designed to prevent, the court may draw the

inference of cause and effect: see *McGhee v. National Coal Board* [1973] 1 W.L.R. 1. I do not read that case as departing from the *Bonnington* case and reversing the onus of proof. But in the end the judge decides as a question of fact whether the case is made out or not, on a balance of probability, taking all the facts into account.

In cases brought under the Fatal Accidents Act 1976 the executor or administrator of the deceased (who for technical reasons is the plaintiff) has to prove that the deceased would have succeeded in an action if he had not died. The proof of liability is thus the same as in actions for personal injuries, save in fatal cases the death is essentially the cause of action: see *Seward v. Vera Cruz (Owners)* (1884) 10 App.Cas. 59, 67, *per* Lord Selborne. The death is the equivalent of the "damage" which in an action for personal injuries completes the cause of action.

Once the "damage" has been proved, the loss and compensation must be assessed as money damages. In fatal cases, where there must be dependants of the deceased before the action will lie, the damages must be "proportioned to the injury resulting from the death to the dependants respectively": see Fatal Accidents Act 1976, section 3(1). The "injury" is financial injury only, and is the equivalent in a fatal case to the "loss" in an action for personal injuries. The onus of proving these is less strict than in the primary proof of liability. In both the proof of liability and the assessment of loss, consideration of chances may enter into it. In proof of liability the chances that a particular cause will produce a particular effect are often relevant. They may range from being certain on the one hand to being negligible or non-existent on the other, but at this stage of the case they are an element, and no more, in the proof of the cause of action. In the assessment of loss the future may have to be looked at, and again chances may be taken into account. Typical examples are the chances that epilepsy may supervene after a head injury. A plaintiff with a 30 per cent. chance of developing epilepsy will recover more damages than one with a 5 per cent. chance. In fatal cases the question is whether the dependant had a reasonable expectation of financial support from the deceased, not whether it is proved on a balance of probabilities that such support would have been received: see *Davies v. Taylor* [1974] A.C. 207. In that case a wife had left her husband five weeks before his death. She had refused to return to him, so the husband instructed his solicitor to begin divorce proceedings. When the husband was killed, she began proceedings under the Fatal Accidents Acts 1846–1959, alleging that there was a prospect of reconciliation, in which case she would have been able to recover as a dependant. She was not believed and the action failed at the proof of "injury" stage, but it was the test of "reasonable expectation" which was adopted.

In the present case, apart from the agreed report of Mr. Westcombe, medical reports were not exchanged. It must have been apparent to the plaintiff's advisers that his leg had a poor chance of recovery in any event, and that he was at risk of losing the case altogether (apart from the five days' pain and suffering) if he could not prove that the delay in diagnosis had had a material adverse effect on him. In other words, he would not have proved the "damage" necessary to establish that part of

his cause of action. Counsel for the plaintiff accordingly opened the case on the basis that he was asking for a finding that the plaintiff had suffered a loss of his chance of recovering from his broken hip and that he should receive only a proportion of the damages which would be appropriate if his eventual condition could be blamed entirely on the defendants. Counsel for the defendants submitted that the proper approach would be to try to prove causation on a balance of probabilities and thereafter, if appropriate, assess damages on the usual basis taking chances into account.

In my opinion this exchange led to a misunderstanding which persisted right up to this court. The plaintiff's medical witness was Mr. Bucknill, a consultant orthopaedic surgeon. He gave evidence that the effect of an injury such as the plaintiff's is to interfere with the blood supply to the epiphysis so that avascular necrosis may develop. There may be haemarthrosis, which means bleeding from ruptured blood vessels into the hip joint. Delay in treating and pinning the damaged bone caused the blood in the haemarthrosis to compress and block the further supply of blood from any undamaged vessels. The result would be adverse. Mr. Bucknill's evidence was that timely surgical intervention would have given the plaintiff a 40 per cent. chance of recovery. The defendants' expert witness was Mr. Bonney. His evidence was that the very nature of this operation on someone so badly injured as the plaintiff was the cause of his final disability because of the manipulation of the limb which it necessarily entailed. The delay did not affect that, and therefore did not cause any additional incapacity.

Both witnesses had seen the hospital records, X-rays and operation notes.

The plaintiff's approach to the claim, as being one for the loss of a chance, resulted in a great deal of the medical evidence being taken up with the question, "Was there a chance and, if so, what was it?" It was dealt with in a somewhat general manner, with some reliance on medical papers and the statistics to be extracted from them. In the end the judge accepted the evidence of neither surgeon in its entirety. He found that the operation ought to have been carried out at once. As to the effects of the delay, he made the following findings of fact [1985] 1 W.L.R. 1036, 1040–1041:

> "(1). Even had the health authority correctly diagnosed and treated the plaintiff on 26 April there is a high probability, which I assess as a 75 per cent. risk, that the plaintiff's injury would have followed the same course as in fact it has, that is, he would have developed avascular necrosis of the whole femoral head with all the same adverse consequences as have already ensued and with all the same adverse future prospects. (2). That 75 per cent. risk was translated by the defendants' admitted breach of duty into an inevitability. Putting it the other way, the defendants' delay in diagnosis denied the plaintiff the 25 per cent. chance that, given immediate treatment, avascular necrosis would not have developed. (3). Had avascular necrosis not developed, the plaintiff would have made a very nearly full recovery. (4). The reason why the delay sealed the plaintiff's fate was because it allowed the pressure caused by haemarthrosis—

the bleeding of ruptured blood vessels into the joint—to compress and thus block the intact but distorted remaining vessels with the result that even had the fall left intact sufficient vessels to keep the epiphysis alive (which, as finding (1) makes plain, I think possible but improbable) such vessels would have become occluded and ineffective for this purpose."

These findings mean that in any event the plaintiff had only a 25 per cent. chance of recovery, but that the delay removed that chance and made his condition that much worse. The judge assessed the damages at £46,000 and awarded him 25 per cent., £11,500, plus the £150.

The defendants accept those findings. Their argument before the judge and in this court was that to find for the plaintiff for the loss of a chance which was itself an improbability was to depart from the rule that liability must be established on a balance of probabilities. In support of that they also submitted that authorities under the Fatal Accidents Acts, such as *Davies v. Taylor* [1974] A.C. 207, are special to cases brought under those Acts and have no application to actions at common law, and that damages awarded for the loss of a chance should be restricted to actions for breach of contract such as *Chaplin v. Hicks* [1911] 2 K.B. 786 and *Marbe v. George Edwards (Daly's Theatre) Ltd.* [1928] 1 K.B. 269. Counsel referred us to a number of cases where actions for negligence have failed on the issue of causation in spite of there having been a breach of duty: such as *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428; *Sykes v. Midland Bank Executors and Trustee Co. Ltd.* [1971] 1 Q.B. 113 and *Robinson v. Post Office* [1974] 1 W.L.R. 1176. All of those cases were decided on their own facts. On the other hand, in *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 a claim against a firm of solicitors was clearly based in negligence and resulted in damages being awarded against them for the loss of a chance of conducting successful litigation against a third party.

There is nothing in the proposed distinction between contract and tort. There would be no sense in a distinction which allowed damages to be recovered from a private doctor but not against a National Health Service doctor.

Nor is the distinction between common law and the Fatal Accidents Act valid. Once the cause of action has been completed, in the one case by proof of "damage" and in the other by proof of death, the assessment of loss which may depend on chances in the future must proceed upon similar lines.

The misunderstanding which arose in the present case came from two sources. One was the presentation of the plaintiff's case, and the other was the concentration in the medical evidence on what would have been the plaintiff's chance of recovery but for the delay in diagnosis. This created the impression that it was the loss of that chance alone which was to be regarded as the "damage" which completed the plaintiff's cause of action entitling him to money compensation for the injury to his leg, rather than a way of computing a loss to which he was already entitled. This ignored the fact that the estimation of chances may enter

into consideration at every stage in a case, both in proof of liability and in assessing damages.

In his closing speech, the plaintiff's counsel said:

> "It is our submission, first of all, that the loss of a chance, even a less than 50 per cent. chance, is enough to found a claim for damages in tort . . . damage is proved by proving on the balance of probabilities the loss of a 25 per cent. chance."

Put simply that way, the proposition is unsustainable. If it is proved statistically that 25 per cent. of the population have a chance of recovery from a certain injury and 75 per cent. do not, it does not mean that someone who suffers that injury and who does not recover from it has lost a 25 per cent. chance. He may have lost nothing at all. What he has to do is prove that he was one of the 25 per cent. and that his loss was caused by the defendant's negligence. To be a figure in a statistic does not by itself give him a cause of action. If the plaintiff succeeds in proving that he was one of the 25 per cent. and that the defendants took away that chance, the logical result would be to award him 100 per cent. of his damages and not only a quarter, but that might be left for consideration if and when it arises. In this case the plaintiff was only asking for a quarter.

Even the judge at one point in his judgment said, at p. 1047:

> "The health authority's breach of duty here (a) denied the plaintiff the 25 per cent. chance of escaping, and thus (b) *may have caused*, the very disability which occurred." (My emphasis).

In the end he decided that the 25/75 per cent. split in the chances was something which went to quantification of damages and not to causation.

The role of the 25/75 split as no more than part of the evidentiary material going to proof of liability seems to have been largely lost sight of. The judge, in the commendable interest of brevity did not give a detailed analysis of the medical evidence on causation. What he did was to make the findings of fact which I have set out earlier. There was evidence to support them in that of Mr. Bucknill. After stating that the plaintiff's femur was displaced and displacement increases bleeding, he went on to say that the longer the displacement continued the greater the increase in the bleeding. The consequence of that would be compression of the blood vessels leading directly to impaired blood supply to the epiphysis. Even though the chance of that happening was less than 50 per cent. or (as the judge found) 25 per cent., that evidence justified the judge in finding the facts that he did. He clearly did not accept Mr. Bonney's evidence that in the plaintiff's case the six days' delay had made no difference at all.

That is sufficient to dispose of this appeal. But the judge dealt with an alternative ground. This was that the loss of the statistical chance could be attached parasitically to the undoubted injury of five days' pain and suffering. He held that it could. This argument really stands or falls with the main one whether the loss of a statistical chance can itself found a claim in law unless causation is properly proved.

It is not the case that in no circumstances can the loss of a chance ever found an action in tort. But it must be where the chance is one

personal to the plaintiff and not to the world at large, or even, if I may coin a phrase, the world at little. The plaintiff is only entitled to compensation for the loss of his own chance and not someone else's. In the actions for breach of contract, for example, such as *Chaplin v. Hicks* [1911] 2 K.B. 786 and *Marbe v. George Edwards (Daly's Theatre) Ltd.* [1928] 1 K.B. 269 there is no problem, the contract was with the plaintiff. In *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 the chance of success was the plaintiff's and no one else's. The imaginary case was put to us in argument of a horse being negligently prevented from arriving at a racecourse in time for the start of the race. Assuming that an action was brought in tort (no breach of contract being committed) it might be that the loss of his chance of winning might avail the owner. The assessment of damages would clearly present a problem, possibly depending on evidence from bookmakers. But that case may be left until it arises.

The defendants in this case are alarmed at the thought that if the loss of a chance of getting better should be capable of being "damage" sufficient to found a cause of action based on medical negligence it will open the floodgates to many actions where in the end no harm has followed. I do not think that alarm is justified. In the first place, a mere statistical chance will not be enough. The chance must be something lost to the individual patient. Secondly, the chance that something may go wrong is normally subsumed in the eventual result. If no harm is caused in the end the plaintiff will have suffered no damage, even if at one stage in his treatment there was a risk that things might go wrong.

In my view the findings of fact conclude this appeal once they are accepted by the defendants. I would therefore dismiss the appeal.

The plaintiff cross-appealed, arguing that the 25 per cent. figure ought to have been 60 per cent. This was based on one answer given by Mr. Bonney in cross-examination. The meaning of the answer, in the context in which it was given, was and is by no means clear. It is quite insufficient to justify an alteration of the figure. I would also dismiss the cross-appeal.

Appeal and cross-appeal dismissed with costs.
Leave to appeal refused.

Solicitors: Lloyd Howorth & Partners, Maidenhead; Hempsons.

P. M.

5 February, 1987. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Ackner and Lord Goff of Chieveley) [1987] 1 W.L.R. 224 allowed a petition by the health authority for leave to appeal.

Adrian Whitfield Q.C., Kieran Coonan and *Andrew Grubb* for the health authority. The issue is whether a plaintiff who has failed to prove

A on the balance of probability that a defendant's admitted breach of duty caused him the injury in respect of which he sues can nevertheless recover damages for loss of an outside chance that, in the absence of that breach of duty, the injury would have been avoided.

On the judge's findings of fact [1985] 1 W.L.R. 1036, 1040–1041 the plaintiff (a) did *not* submit that the delay had worsened or made any material contribution to his disability but (b) instead submitted that, as B the delay had denied him a 25 per cent. chance of making a good recovery, he was entitled to damages not only for five days' pain and suffering but also for loss of that chance, to be calculated by reference to 25 per cent. of the full value of the actual disability.

Alone among their Lordships who have so far considered the case, Croom-Johnson L.J. considered that the plaintiff should succeed on the C facts found and, like Simon Brown J., that the award for loss of a chance could be attached "parasitically" to the undoubted injury consisting exclusively of five days' pain and suffering. Those views are incorrect. (a) Croom-Johnson L.J. appears to have interpreted the findings of fact as meaning that by compressing and blocking the blood vessels the delay not only removed a 25 per cent. chance of recovery but D "made his condition that much worse" (ante, p. 768B). However, the findings of fact mean that, as a matter of probability, the compression and blocking of blood vessels actually had no effect on the plaintiff's ultimate condition, for: "In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not is treated as certain": *per* Lord Diplock in *Mallett v. McMonagle* [1970] A.C. 166, 176. (b) Further, to say that an award for E the "lost chance" of avoiding disability can be parasitical on the award for five days' pain and suffering is illogical because (i) it was found as a fact that the disability was *not* consequent on the delay; (ii) in any event the disability was not a consequence or sequela of the five days' pain and suffering; the two were thus unconnected. (c) Further, the case is thus one of law and principle alone.

F If the decision as it stands is correct, the following implications result. (a) The scope of the tort of negligence has been greatly extended. Plaintiffs need no longer show damage to person or property or (in appropriate cases) economic loss consequent on a breach of duty by defendants in order to succeed. It will be enough if they show that there is a chance, even (subject to the "de minimis" principle) an outside chance, that the breach of duty caused them loss or damage. (b) This G departure from the "but for" test of causation means that a plaintiff may get damages even if a defendant's breach of duty probably made no difference to his or her person, property or pocket. (c) In practical terms. this also means that there is an evidential burden on a defendant to displace the suggestion that there is a chance that his breach of duty affected the plaintiff. (d) There is no reason why, in the personal injury H field, this principle should be applied to iatrogenic injury alone. It could equally well apply in industrial injury and road traffic accident cases. (e) If a plaintiff who has lost a one-in-four chance that the defendant's breach of duty affected him can get a 25 per cent. award, it should

follow that a plaintiff who shows a higher probability, e.g. a three-in-four chance, gets a 75 per cent. award. In other words, although he has proved causation on a strong balance of probability, he suffers a 25 per cent. discount because he cannot prove causation with absolute certainty. This consequence was accepted by Simon Brown J. in his subsequent decision in *Bagley v. North Herts Health Authority* (1986) 136 N.L.J. 1014, in which he discounted an award for a still-birth because there was a 5 per cent. risk that the plaintiff would have had a still-born child even if the hospital had not been negligent. Sir John Donaldson M.R. sought to confine the scope of such "proportionate awards" to cases in which "fate," not the plaintiff's choice, would have determined what happened in the absence of negligence. This would, however, produce further anomalies. For example, in the field of medical negligence proportionate awards would on that basis be confined to cases of diagnosis and treatment (like the present) but be unavailable in cases of advice or warning, in which the question of how the plaintiff would have chosen to react to a doctor's proper advice or warning, had it been given, comes under investigation. (f) Plaintiffs deprived of a chance of recovery or exposed to a risk of injury would have a right of action in tort (albeit for nominal damage) even if they remained wholly uninjured in the event. (g) A limitation period will start to run when the "chance" or "benefit" is lost. It is arguable that section 11 of the Limitation Act 1980 does not apply to it because the damages claimed do not "consist of or include damages in respect of personal injuries." If so, the six-year limitation period will apply for loss of "chance" or "benefit." In any event, if personal injury develops sometime after the chance is lost, presumably a second limitation period in respect of the claim for damages for personal injuries will start. (h) A different test will be applied against a doctor whose patients survive (and can claim for a "lost chance") from that to be applied against a doctor who has killed his patient but whose dependants have the further burden of proving, on the balance of probability, that "death [was] caused by any wrongful act, neglect or default" (Fatal Accidents Act 1976, s. 1).

Although medical and dental cases are thought of as "professional negligence" cases, they differ from other cases brought against professional men because of the nature of damage caused by fault: they are a form of personal injury action. They can be brought in tort or (at least where care is provided privately) in contract, but unless there is some special or unusual term the practitioner does not contract to offer a cure or even a chance of a cure. The implied term of the contract is that he exercises due skill and care, and thus (normally) the duty under contract is the same as in tort: *Eyre v. Measday* [1986] 1 All E.R. 488 and *Thake v. Maurice* [1986] Q.B. 644. In a negligence action, the plaintiff will not succeed unless he shows that *but for* the defendant's fault the injury of which he complains would not have resulted: *Cork v. Kirby Maclean Ltd.* [1952] 2 All E.R. 402: *McWilliams v. Sir William Arrol & Co. Ltd.* [1962] 1 W.L.R. 295. Heretofore, this test has always been accepted and applied in medical negligence cases, e.g. *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428, 439 and *Robinson v. Post Office* [1974] 1 W.L.R. 1176, 1188. It is

accepted that a plaintiff succeeds not only if he shows that a defendant's negligence was the sole cause of his injury but also if he shows that it has made a material contribution to it (*Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613). That, however, has not been the plaintiff's case, nor, on the judge's findings of fact, could it have been: impairment of the blood vessels by the delay did not "tip the scale" so as to make a material contribution. In so far as *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 supports a contrary view it is wrongly decided and should not be followed. In particular, the dicta of Lord Salmon, at p. 12D–F, in so far as they suggest that a material contribution is made by negligence that increases a pre-existing 52 per cent. risk to one of 90 per cent., should not be followed. That is contrary to principle and authority. The basic question is: "did the breach of duty cause the injury to the plaintiff, or did it not?" This investigation into past events, and the test used to decide what did happen, is that of the balance of probability: see *Davies v. Taylor* [1974] A.C. 207, 212A–213A. The alternative approach, to award damages for the outside chance that the fault made some difference to the plaintiff's ultimate medical condition, has been rejected in Scotland: *Kenyon v. Bell,* 1953 S.C. 125; see also *Cutler v. Vauxhall Motors Ltd.* [1971] 1 Q.B. 418, 422–423 (Russell L.J.). It is also inconsistent with the proper approach in actions for negligence against barristers: a client suing a barrister "must prove that if the action had been conducted competently by his counsel he would have succeeded instead of failed": *per* Lord Diplock in *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, 222E; see also *Sykes v. Midland Bank Executor and Trustee Co. Ltd.* [1971] 1 Q.B. 113 (see *per* Karminski L.J., at p. 131H).

Even if, contrary to the health authority's submissions, damages for loss of a chance are *in principle* recoverable in tort, they cannot be awarded on that basis in the present case because Simon Brown J. found, correctly applying the test of the balance of probability, that had all care been taken the plaintiff would still have suffered from the same result. This is *not* the equivalent of, for example, a finding that the odds on a horse prevented from running a race were or would have stood at 3 to 1; it is the equivalent of a finding of fact that the horse in question would actually have lost the race had it started. Such a finding would be a conclusive obstacle to an action by the owner for damages calculated by reference to the prize money.

A number of reasons have been advanced and/or accepted as to why the plaintiff should succeed. (a) It was said to be inherently unjust that a patient who received negligent treatment that might have affected him or her adversely (even though it probably did not do so) should have no compensation. However: (i) it is even less just that a defendant should pay damages to a plaintiff who has not suffered from his fault, or that the plaintiff (because of the uncertainty of medical science, where it is often said that nothing is certain) should have his damages discounted even though causation is established as a strong probability. (ii) The same principle must apply to employers and motorists who may or may not have caused injury as to medical men. In those less emotive contexts it would seem unjust to make a defendant employer or motorist pay

damages to somebody who was probably unaffected by their conduct. (b) It was said by Sir John Donaldson M.R. (ante, p. 761F) that the true loss was not that of a chance but of "the *benefit* of timeous treatment." Assuming such a loss, however, the question still remains: did such a loss make any actual difference to the plaintiff? If the answer is "probably not" (which in law is equivalent to "no"), causation has not been proved and damages should not be awarded for loss of what theoretically might have been established (a causal link) but which has been found by the trial judge not to have existed in fact. (c) An analogy has been drawn by Dillon L.J. in particular with *Chaplin v. Hicks* [1911] 2 K.B. 786. However, the distinction between that and the present case is not merely that one was in contract and the other in tort but that (i) in *Chaplin v. Hicks* the defendant actually contracted to provide a chance, whereas the health authority did not; (ii) in *Chaplin v. Hicks* there was no finding whether, had the defendant performed his duty, the plaintiff would have won or lost, nor could there have been; here, there was a clear finding that the breach of duty did not cause permanent disability. It is noticeable that Dillon L.J., having based his reasoning on *Chaplin v. Hicks,* concluded (ante, p. 764E): "The position would have been different if, as in *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428, the finding on the facts on the balance of probabilities had been that had all care been taken still the patient would have suffered the same result. In that event there would, on the facts, have been no chance and the plaintiff would thus have suffered no damage from the negligence." At this critical point of his judgment, he overlooked the fact that the findings of Simon Brown J. had been precisely to such effect. Therefore, on his own reasoning, *Chaplin v. Hicks* should not have availed the plaintiff. (d) Cases on the assessment of damages, such as *Davies v. Taylor* and those where the prospects of epilepsy or osteoarthritis (or of winning a competition: *Mulvaine v. Joseph* (1968) 112 S.J. 927) are relevant to the evaluation of the extent of an injury already proved to have been caused by negligence, were relied on by the plaintiff and treated as relevant by Simon Brown J. and Dillon and Croom-Johnson L.JJ. However, in the present case, the permanent disability was not and could not have been a sequela of five days' pain and suffering; the enquiry was whether the fault had caused that separate disability. This case is concerned not with the possible future contingencies of an injury proved to have been caused by negligence, but with whether there was proof at all that the relevant injury was so caused. The examples cited above are of cases dealing with evaluation of proved damage, i.e. the process of quantification of damages, but the present problem is to determine whether damage of a recoverable type was proved to have been caused. This is the different problem of causation of damage. (e) Solicitors' negligence cases were relied on as supporting the plaintiff's claim. Until *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp* [1979] Ch. 384 it was generally thought that actions against a solicitor lay only in contract: see, e.g., *Clark v. Kirby-Smith* [1964] Ch. 506, 510. Thus, cases such as *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 can be read (despite the use in them of the word "negligence") as cases in contract

in which, following proof of a breach of contract or duty, the remaining issue was not causation of damage but quantification of damages: see *per* Lord Evershed M.R. in *Kitchen,* at pp. 574–575. If that is so, such cases are not authority for the proposition that damages for loss of a chance are recoverable in tort. Alternatively, if these are to be treated as cases in tort, the plaintiff, to succeed, must show that his solicitor's negligence has lost him "some right of value" such as a worthwhile cause of action. On this view, chances are again relevant to quantification of damages rather than proof of cause of damage. Thus, a plaintiff with a 40 per cent. chance of winning a case will be better off if his solicitors are negligent because he will get 40 per cent. of the value of his injury, even though if he had fought the case and lost it he would have got nothing.

If the plaintiff's fall had been the fault of the education authority, their negligence would not have been a cause of the avascular necrosis. The plaintiff would have had no cause of action because the injury would have occurred in any event. [Reference was made to *Atiyah, Accidents, Compensation and the Law,* 3rd ed. (1980), pp. 114 et seq.; 4th ed. (1987), pp. 95 et seq.; *Hart and Honoré, Causation in the Law,* 2nd ed. (1985), pp. 417 et seq.; Glanville Williams, "Causation in the Law" [1961] C.L.J. 62, 62–73 and *Gauntlett v. Northampton Health Authority* (unreported), 12 December 1985; Court of Appeal (Civil Division) Transcript No. 835 of 1985.]

Graeme Williams Q.C. and *David Ashton* for the plaintiff. The issue in the appeal is: can a plaintiff recover compensatory damages in a claim in tort where he proves on the balance of probabilities that, as a result of the tort, he has lost a less than 50 per cent. chance of some benefit and where (but for the tort) it would have become clear by the date of the trial whether he would or would not have obtained the benefit in question? The issue must be stated in this form because it appears from the health authority's contentions in the courts below and from their petition for leave to appeal that they accept that damages for the loss of a chance are recoverable: (a) where the claim lies in contract, irrespective of percentage; (b) where the lost chance is greater than 50 per cent., irrespective of the cause of action; (c) where the lost chance lies in the future at the date of trial, irrespective of percentage or the cause of action.

It is accepted that the question is, as Simon Brown J. put it [1985] 1 W.L.R. 1036, 1043H, one of classification between causation on the one hand and quantification on the other and that the decision is one of policy (p. 1048C). Further, it is accepted that there is no English appellate decision precisely on the point.

The plaintiff's fundamental submissions in the House of Lords, as in the courts below, are as follows. (i) A substantial (as opposed to a speculative) chance of benefit or advantage is an asset the loss of which can be the subject matter of an award of compensatory damages in tort, as well as in contract, provided that the plaintiff proves on the balance of probabilities (a) that the tort or the breach of contract caused the chance to be lost and (b) that the lost chance fell within the appropriate area of foreseeable loss (i.e., is not too remote). (ii) Such damages are recoverable, provided that the requirements of causation and remoteness

are satisfied, (a) irrespective of whether the tort in question is actionable per se or actionable only on proof of damage; (b) irrespective of whether the chance is greater or less than 50 per cent., so long as it is substantial; (c) irrespective of whether the outcome of the chance would or would not (but for the tort) have become clear by the date of trial; (d) irrespective of whether the plaintiff proves any other loss or damage resulting from the tort.

The above propositions are simply the converse of the well-established rule that the incurring (or acquisition) of a substantial (as opposed to a speculative) *risk* can be the subject matter of an award of damages in similar circumstances. Once it is accepted that the loss of a chance (of more, or less, than 50 per cent.) is a proper matter for compensatory damages, it remains to evaluate the loss. This may be difficult, but difficulty of ascertainment is not, and never has been, a bar to recovery of damages. The approach adopted by Simon Brown J. and for which the plaintiff contends has been established for many years in closely linked, analogous and logically indistinguishable fields of litigation. If a different approach, such as that contended for by the health authority, is adopted in the present case, extraordinary and undesirable anomalies will arise between cases, and heads of damage, where awards are and are not made. For instance: (i) solicitors' professional negligence: see *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563; (ii) insurance brokers' professional negligence: see *Everett v. Hogg, Robinson & Gardner Mountain (Insurance) Ltd.* [1973] 2 Lloyd's Rep. 217; (iii) fatal accident claims: see *Wathen v. Vernon* [1970] R.T.R. 471; *Davies v. Taylor* [1974] A.C. 207; (iv) contract cases: see *Chaplin v. Hicks* [1911] 2 K.B. 786; (v) damages for lost future chances or acquired future risks: see *Hawkins v. New Mendip Engineering Ltd.* [1966] 1 W.L.R. 1341; *Mallett v. McMonagle* [1970] A.C. 166; provisional damages under section 6 of the Administration of Justice Act 1982. [Reference was made to the Law Commission Report on Personal Injury Litigation—Assessment of Damages (Law Com. No. 56), paras. 232–235.]

The plaintiff relies on the observations of Lord Diplock in *Mallett v. McMonagle,* at pp. 176E–G. There are four kinds of factual issues that the court has to resolve, only three of which are expressly dealt with by Lord Diplock in that passage; (i) the issue: "what did happen in the past?" (ii) the issue: "what will happen in the future?" (iii) the issue: "what would have happened in the past but for the tort or breach of contract?" (iv) the issue: "what would have happened in the future but for the tort or breach of contract?" Lord Diplock dealt with issue (i); here, the court has to decide the issue on the balance of probabilities; and he dealt with issues (ii) and (iv): here, the court has to make an estimate as to chances whether more or less than even. He did not, however, deal with issue (iii), which arises in this appeal. Neither logic nor common sense can support any difference between Lord Diplock's approach to issues (ii) and (iv) and the proper approach to issue (iii). The true distinction lies between "what did happen in the past" (i.e., issue (i)), on the one hand, and "what will happen, or would have

happened in the past or in the future" (i.e., issues (ii), (iii) and (iv)), on the other.

The problems and absurdities resulting from the opposite view, namely, that issue (iii) has to be resolved on the same basis as issue (i), are illustrated by the following example. A serving soldier, intending to make the army his career, is severely injured in a motor accident in 1984, being rendered paraplegic. His claim for damages comes on for trial in 1987. Evidence is given and accepted that: (i) but for the accident, he would have had a 40 per cent. chance of promotion to corporal in 1986 (i.e., before the trial); and (ii) but for the accident, he would have had a 25 per cent. chance of further promotion to sergeant in 1988 (i.e. in the future). On the health authority's case, the lost 40 per cent. chance of promotion to corporal cannot be reflected in damages because it is not proved on the balance of probabilities that he would have been promoted, but the lost 25 per cent. chance of promotion to sergeant attracts an award of damages on *Mallett* principles.

The plaintiff adopts paragraphs 275–280 (pp. 197–203) of *McGregor on Damages*, 14th ed. (1980), and the reasoning and conclusions of Simon Brown J. [1985] 1 W.L.R. 1036, 1044B–1046G, 1049H–1050E; Sir John Donaldson M.R. [1987] 2 W.L.R. 287, 294F–H; Dillon L.J. (short, but right), at pp. 298G–299C and Croom-Johnson L.J., at p. 302H. The other formulations of the issue (by Sir John Donaldson M.R., at p. 295F, and Croom-Johnson L.J., at pp. 303A–304A) do not assist in resolving it. Of Simon Brown J.'s conclusions [1985] 1 W.L.R. 1036, 1050 the plaintiff relies on (1) and (3); (2) is a restatement of *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 but is not in point here; (4) is obiter and unsupported by authority. The judgment of Dillon L.J. in the Court of Appeal encapsulates the plaintiff's contentions accurately.

The principle of awarding damages for the loss of a chance is neither a novel nor a startling development: it has formed the basis of awards of damages in solicitors' (and other professional) negligence cases, and hence of the terms of professional negligence insurance, for at least 30 years and was recently reaffirmed in the Court of Appeal in *Dunbar v. A. & B. Painters Ltd.* [1986] 2 Lloyd's Rep. 38. The decision of Simon Brown J. has been noted with approval in *Clerk & Lindsell on Torts*, 15th ed. (1982), Fourth Cumulative Supplement (1986), paras. 5-07–5-08, and by Professor B. A. Hepple, *All England Law Reports Annual Review 1985*, p. 310.

The present issue has been considered in a number of cases in the United States, but the decisions are mostly in the appellate courts of various states and are not consistent with one another. The cases are summarised in *Dooley, Modern Tort Law* (1982), vol. 2 (1983), para. 34:106; the most authoritative recent case is *Herskovits v. Group Health Cooperative of Puget Sound* (1983) 664 P. 2d 474, in which section 323 of the American *Restatement, Second, Torts*, vol. 2 (1965), is relied on by the majority. There appear to be no relevant decisions in Canada, Australia or New Zealand, nor consideration of the issue in Commonwealth text-books.

Chaplin v. Hicks [1911] 2 K.B. 786 has been unquestioned for 75 years, was cited with approval (but in a wholly different field) in the

House of Lords in *London & North Eastern Railway Co. v. B. A. Collieries Ltd.* [1945] A.C. 143, 157 (Sir Walter Monckton K.C.), 172 (Lord Thankerton), 178 (Lord Macmillan) and 185–186 (Lord Wright), has been repeatedly relied on in the Court of Appeal and at first instance and is referred to in every text-book on the topic. Immediately before the defendant in *Chaplin v. Hicks* breached his contract, the plaintiff had a less than 50 per cent. chance of success in the competition, being one of 50 ladies competing for 12 theatrical engagements, worth an average of £600 over three years. The award of £100 reflects the loss of an approximate 25 per cent. chance of such an engagement.

Chaplin v. Hicks was, of course, a contract case, but no sensible distinction can be drawn between contract and tort on this point, as the courts below have held, nor between one tort and another. In negligence, the plaintiff must prove damage to complete his cause of action, but in trespass (including false imprisonment) damage is not a necessary ingredient. If a professional golfer were falsely imprisoned and prevented from taking part in a lucrative competition he could recover damages for the lost chance of the prize even though he had a less than 50 per cent. chance of winning: cf. *Mulvaine v. Joseph* (1968) 112 S.J. 927.

The approach for which the plaintiff contends was established in *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563: nothing in that case suggests that the plaintiff would have lost the action if her chances of success had been less than 50:50. The approach has been applied where the negligence was unconnected with litigation: see *Otter v. Church, Adams, Tatham & Co.* [1953] Ch. 280. *Chaplin v. Hicks* and *Kitchen v. Royal Air Force Association* can only be explained on the basis that the chance is a thing in itself that can be lost or damaged. The chance does not have to be a chose in action.

The decisions in *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 Q.B. 428; *Sykes v. Midland Bank Executor and Trustee Co. Ltd.* [1971] 1 Q.B. 113 and *Robinson v. Post Office* [1974] 1 W.L.R. 1176 can all be distinguished, as they were by Simon Brown J., on the ground that the plaintiffs had *no* chance to lose; here the plaintiff had, but lost, a 25 per cent. chance.

A finding that a tort or breach of contract has deprived a plaintiff of a *less* than 50 per cent. chance of some benefit or advantage (such as success in litigation or successful surgery) necessarily and inevitably involves a finding that, on a balance of probabilities, the litigation or surgery would not have been successful. Hence, if the appeal is allowed, the only alternative is the all-or-nothing approach whereby those deprived of 51 per cent. chances recover 100 per cent. but those deprived of 49 per cent. chances recover nothing. This approach was rejected by the House of Lords in *Davies v. Taylor* [1974] A.C. 207 and by Cairns L.J. (dissenting) in the Court of Appeal [1972] 1 Q.B. 286.

Whitfield Q.C. in reply referred to *Prosser and Keeton on The Law of Torts,* 5th ed. (1984), pp. 263–272 and *Ketteman v. Hansel Properties Ltd.* [1987] A.C. 189.

Their Lordships took time for consideration.

2 July. LORD BRIDGE OF HARWICH. My Lords, the respondent plaintiff is now 23 years of age. On 26 April 1977, as a schoolboy of 13, whilst playing in the school lunch hour he climbed a tree to which a rope was attached, lost his hold on the rope and fell some 12 feet to the ground. He sustained an acute traumatic fracture of the left femoral epiphysis. Within hours he was taken to St. Luke's Hospital, Maidenhead, for which the appellant health authority ("the authority") was responsible. Members of the hospital staff examined him, but failed to diagnose the injury and he was sent home. For five days he was in severe pain. On 1 May 1977 he was taken to the hospital once more and this time X-rays of his hip yielded the correct diagnosis. He was put on immediate traction, treated as an emergency case and transferred to the Heatherwood Hospital where, on the following day, he was operated on by manipulation and reduction of the fracture and pinning of the joint. In the event the plaintiff suffered an avascular necrosis of the epiphysis. The femoral epiphysis is a layer of cartilage separating the bony head from the bony neck of the femur in a growing body. Avascular necrosis results from a failure of the blood supply to the epiphysis and causes deformity in the maturing head of the femur. This in turn involves a greater or lesser degree of disability of the hip joint with a virtual certainty that it will in due course be aggravated by osteoarthritis developing within the joint.

The plaintiff sued the authority, who admitted negligence in failing to diagnose the injury on 26 April 1977. Simon Brown J. [1985] 1 W.L.R. 1036, in a judgment delivered on 15 March 1985, awarded £150 damages for the pain suffered by the plaintiff from 26 April to 1 May 1977 which he would have been spared by prompt diagnosis and treatment. This element of the damages is not in dispute. The authority denied liability for any other element of damages. The judge expressed his findings of fact as follows, at pp. 1040–1041:

> "(1) Even had the health authority correctly diagnosed and treated the plaintiff on 26 April there is a high probability, which I assess as a 75 per cent. risk, that the plaintiff's injury would have followed the same course as it in fact has, that is, he would have developed avascular necrosis of the whole femoral head with all the same adverse consequences as have already ensued and with all the same adverse future prospects. (2) That 75 per cent. risk was translated by the health authority's admitted breach of duty into an inevitability. Putting it the other way, their delay in diagnosis denied the plaintiff the 25 per cent. chance that, given immediate treatment, avascular necrosis would not have developed. (3) Had avascular necrosis not developed, the plaintiff would have made a very nearly full recovery. (4) The reason why the delay sealed the plaintiff's fate was because it allowed the pressure caused by haemarthrosis—the bleeding of ruptured blood vessels into the joint—to compress and thus block the intact but distorted remaining vessels with the result that even had the fall left intact sufficient vessels to keep the epiphysis alive (which, as finding (1) makes plain, I think possible but improbable) such vessels would have become occluded and ineffective for this purpose."

On the basis of these findings he held, as a matter of law, that the plaintiff was entitled to damages for the loss of the 25 per cent. chance that, if the injury had been promptly diagnosed and treated, it would not have resulted in avascular necrosis of the epiphysis and the plaintiff would have made a very nearly full recovery. He proceeded to assess the damages attributable to the consequences of the avascular necrosis at £46,000. Discounting this by 75 per cent., he awarded the plaintiff £11,500 for the lost chance of recovery. The authority's appeal against this element in the award of damages was dismissed by the Court of Appeal (Sir John Donaldson M.R., Dillon and Croom-Johnson L.JJ.) [1987] 2 W.L.R. 287 on 14 November 1986. The authority now appeal by leave of your Lordships' House.

I would observe at the outset that the damages referable to the plaintiff's pain during the five days by which treatment was delayed in consequence of failure to diagnose the injury correctly, although sufficient to establish the authority's liability for the tort of negligence, have no relevance to their liability in respect of the avascular necrosis. There was no causal connection between the plaintiff's physical pain and the development of the necrosis. If the injury had been painless, the plaintiff would have to establish the necessary causal link between the necrosis and the authority's breach of duty in order to succeed. It makes no difference that the five days' pain gave him a cause of action in respect of an unrelated element of damage.

Before examining the judge's findings more closely, it is necessary to say something of the conflict of expert medical evidence which the judge had to resolve. The evidence is highly technical and not altogether easy to follow. But at least this much is clear, that the failure of the blood supply to the epiphysis which caused the avascular necrosis could itself only have been caused in one of two ways: either the injury sustained in the fall caused the rupture of such a high proportion of the vessels supplying the epiphysis with blood that necrosis was bound to develop, or the blood vessels remaining intact were sufficient to keep the epiphysis alive but were subsequently occluded by pressure within the joint caused by haematoma (bruising) or haematosis (bleeding into the joint).

The plaintiff's expert witness was extremely tentative in his view as to the part which the delay in treatment may have played in causing avascular necrosis. In his evidence-in-chief he described the risk of the plaintiff suffering avascular necrosis even if promptly treated as "very considerable" and "very high." He said:

> "Statistically, on reports published, he had a marginally better chance of escaping it than having avascular necrosis had it been treated expeditiously."

He was asked:

> "Was there a chance, if the condition had been diagnosed and treated promptly, that no avascular necrosis would have occurred at all in any part?"

He replied: "There was a small chance, yes." But he also said that the delay in treatment had made the development of total avascular necrosis

of the epiphysis inevitable. His first three answers to questions put to him in cross-examination were as follows:

> "Q. As I understand it, Mr. Bucknill, you accept that even if there had been no delay, it is likely that there would have been avascular necrosis of the whole head? A. Yes, indeed. Q. And so the probabilities are that the delay in this case made no difference to the eventual outcome of this head? A. As I said, I think it made it inevitable that avascular necrosis occurred rather than likely. Q. In other words, what was always a probability became inevitable? A. Yes."

Later he modified these answers. He said that, given prompt treatment, he thought avascular necrosis was "likely but not probable." He explained that by "likely" he meant about a 40 per cent. chance, by "probable" he meant something over 60 per cent. He also explained his view that delay would have made a total avascular necrosis inevitable by the occlusion of intact blood vessels resulting from haematoma.

By contrast the authority's expert witness was emphatic, even dogmatic, in his evidence. His opinion was that the initial traumatic rupture of the blood vessels caused by the fall must have been so extensive that avascular necrosis was bound to result. He rejected the theory that the failure of the blood supply could be attributed to a haematoma, a condition which, in his opinion, would not occur in this injury. In this connection he distinguished between a haematoma and a haematosis, a condition which could occur in this injury but which would not, in his opinion, occlude intact blood vessels.

The judge indicated his assessment of these two witnesses as follows:

> "I regret that I found certain parts of the evidence of both experts, highly qualified and experienced although they both undoubtedly are, difficult to accept, either as a result of internal inconsistency within their evidence or because of what seemed to be an intrinsic want of logic in some particular expressed view. I recognise that the explanation for this may well lie in the deficiencies of my own medical understanding, but the forensic process requires only that I do my best. In the result I find myself unattracted to, and finally unable to accept, either of the competing extreme views.

In analysing the issue of law arising from his findings the judge said [1985] 1 W.L.R. 1036, 1043–1044:

> "In the end the problem comes down to one of classification. Is this on true analysis a case where the plaintiff is concerned to establish causative negligence or is it rather a case where the real question is the proper quantum of damage? Clearly the case hovers near the border. Its proper solution in my judgment depends upon categorising it correctly between the two. If the issue is one of causation then the health authority succeed since the plaintiff will have failed to prove his claim on the balance of probabilities. He will be lacking an essential ingredient of his cause of action. If, however, the issue is one of quantification then the plaintiff succeeds because it is trite

law that the quantum of a recognised head of damage must be evaluated according to the chances of the loss occurring." A

He reached the conclusion that the question was one of quantification and thus arrived at his award to the plaintiff of one quarter of the damages appropriate to compensate him for the consequences of the avascular necrosis.

It is here, with respect, that I part company with the judge. The B plaintiff's claim was for damages for physical injury and consequential loss alleged to have been caused by the authority's breach of their duty of care. In some cases, perhaps particularly medical negligence cases, causation may be so shrouded in mystery that the court can only measure statistical chances. But that was not so here. On the evidence there was a clear conflict as to what had caused the avascular necrosis. C The authority's evidence was that the sole cause was the original traumatic injury to the hip. The plaintiff's evidence, at its highest, was that the delay in treatment was a material contributory cause. This was a conflict, like any other about some relevant past event, which the judge could not avoid resolving on a balance of probabilities. Unless the plaintiff proved on a balance of probabilities that the delayed treatment was at least a material contributory cause of the avascular necrosis he D failed on the issue of causation and no question of quantification could arise. But the judge's findings of fact, as stated in the numbered paragraphs (1) and (4) which I have set out earlier in this opinion, are unmistakably to the effect that on a balance of probabilities the injury caused by the plaintiff's fall left insufficient blood vessels intact to keep the epiphysis alive. This amounts to a finding of fact that the fall was the sole cause of the avascular necrosis. E

The upshot is that the appeal must be allowed on the narrow ground that the plaintiff failed to establish a cause of action in respect of the avascular necrosis and its consequences. Your Lordships were invited to approach the appeal more broadly and to decide whether, in a claim for damages for personal injury, it can ever be appropriate, where the cause of the injury is unascertainable and all the plaintiff can show is a F statistical chance which is less than even that, but for the defendant's breach of duty, he would not have suffered the injury, to award him a proportionate fraction of the full damages appropriate to compensate for the injury as the measure of damages for the lost chance.

There is a superficially attractive analogy between the principle applied in such cases as *Chaplin v. Hicks* [1911] 2 K.B. 786 (award of G damages for breach of contract assessed by reference to the lost chance of securing valuable employment if the contract had been performed) and *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563 (damages for solicitors' negligence assessed by reference to the lost chance of prosecuting a successful civil action) and the principle of awarding damages for the lost chance of avoiding personal injury or, in medical negligence cases, for the lost chance of a better medical result H which might have been achieved by prompt diagnosis and correct treatment. I think there are formidable difficulties in the way of accepting the analogy. But I do not see this appeal as a suitable occasion

for reaching a settled conclusion as to whether the analogy can ever be applied.

As I have said, there was in this case an inescapable issue of causation first to be resolved. But if the plaintiff had proved on a balance of probabilities that the authority's negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have entitled the authority to a discount from the full measure of damage to reflect the chance that, even given prompt treatment, avascular necrosis might well still have developed. The decisions of this House in *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613 and *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 give no support to such a view.

I would allow the appeal to the extent of reducing the damages awarded to the plaintiff by £11,500 and the amount of any interest on that sum which is included in the award.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner. I agree with all three speeches, and for the reasons contained in them I would allow the appeal.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Bridge of Harwich and Lord Ackner. I agree with them that this appeal should be allowed for the reasons which they have given.

In their printed case the authority first took the position that they were entitled to succeed in this appeal because the plaintiff had not proved that any loss or damage (other than five days' pain and suffering) had been caused by the authority's breach of duty. They also submitted that damages for loss of a chance were not recoverable in tort and at the close of the hearing Mr. Whitfield, for the authority, invited your Lordships to decide this case not only on the ground of fact which he submitted was available but also on the more general ground that damages for loss of a chance could not be awarded. This latter submission has been discussed in the course of the hearing very fully and I wish to add some observations, particularly on that aspect of the case.

When Mr. Williams, who appeared for the plaintiff, was invited to say what he meant by a chance he said that in relation to the facts of this case as found by the judge what was meant by a chance was that if 100 people had suffered the same injury as the plaintiff 75 of them would have developed avascular necrosis of the whole femoral head and 25 would not. This, he said, was an asset possessed by the plaintiff when he arrived at the authority's hospital on 26 April 1977. It was this asset which Mr. Williams submits the plaintiff lost in consequence of the negligent failure of the authority to diagnose his injury properly until 1 May 1977.

The case closest on its facts to the present from the United Kingdom, cited at the hearing before your Lordships, is *Kenyon v. Bell*, 1953 S.C. 125. In that case the lower lid of a child's eye was cut as a result of an accident and subsequently the eye had to be removed by operation. An action for damages was raised against the medical practitioner who had first treated the injury, alleging that he had failed to exercise reasonable care and ordinary professional skill in carrying out his examination and treatment of the injury and that as a result the child had not been given certain treatment which "'would have made the saving of the eye a certainty or alternatively . . . would have materially increased the chance of saving the eye.'" The medical practitioner contended that since all that was being offered to be proved was the weaker of the two alternative statements the case should not be allowed to proceed to proof since the weaker alternative alleging that the treatment would materially have increased the chance of saving the eye did not justify a claim for damages. Lord Guthrie held that the loss of a chance of saving the eye was not of itself a matter which would entitle the claim to succeed but founding particularly on the use of the word "materially" in the pleadings to qualify the chance of saving the eye by proper treatment Lord Guthrie held that on the evidence the chance of saving the eye by proper treatment might be proved to be so material that the natural and reasonable inference to draw from the evidence would be that the loss of the eye was due to the absence of such treatment. In that event, the claim would succeed. Accordingly he allowed it to go to proof. This illustrates that where what is at issue is a patient's condition on being presented to a medical practitioner the question whether the condition was such that proper treatment could effect a particular result is to be determined on the balance of probabilities and that one way of describing that balance is to say that there was at that time a sufficient chance that the particular result could be attained to justify holding that the loss of that result was caused by the absence of proper treatment. On the other hand, Lord Guthrie makes it clear that, in his opinion, while the fault could be charged against the doctor as being failure to give the child the opportunity of having an eye preserved by proper treatment, unless the eye would have been saved by such treatment no loss would have been established and no claim for damages justified in respect thereof.

After the proof, Lord Strachan in a decision, which is unreported, of 9 April 1954 held that the defender had established that the boy's eye was irreparably injured on 15 March 1951 and that no treatment could have made any difference because the initial injury involved a perforating wound of the sclera with consequent haemorrhaging into the interior of the eye.

In my opinion, it is perfectly correct to apply the same approach in the present case: what was the plaintiff's condition on being first presented at the hospital? Did he have intact sufficient blood vessels to keep the affected epiphysis alive? The judge had evidence from the authority's expert which amounted to an assertion that the probability was 100 per cent. that the fall had not left intact sufficient vessels to keep the epiphysis alive while he had evidence from Mr. Bucknill, for the plaintiff, which, although not entirely consistently, suggested that the

probability was perhaps between 40 and 60 per cent., say 50 per cent., that sufficient vessels were left intact to keep the epiphysis alive. The concluding sentence in the judge's fourth finding in fact makes it plain, in my opinion, that he took the view, weighing that testimony along with all the other matters before him, that it was more probable than not that insufficient vessels had been left intact by the fall to maintain an adequate blood supply to the epiphysis and he expressed this balance by saying that it was 75 per cent. to 25 per cent., a result reached perhaps as Mr. Williams suggested by going for a figure midway between the competing estimates given by the parties' experts in evidence. Although various statistics were given in evidence, I do not read any of them as dealing with the particular probability which the judge assessed at 75 per cent. to 25 per cent. In the circumstances of this case the probable effect of delay in treatment was determined by the state of facts existing when the plaintiff was first presented to the hospital. It is not, in my opinion, correct to say that on arrival at the hospital he had a 25 per cent. chance of recovery. If insufficient blood vessels were left intact by the fall he had no prospect of avoiding complete avascular necrosis whereas if sufficient blood vessels were left intact on the judge's findings no further damage to the blood supply would have resulted if he had been given immediate treatment, and he would not have suffered the avascular necrosis.

As I have said, the fundamental question of fact to be answered in this case related to a point in time before the negligent failure to treat began. It must, therefore, be a matter of past fact. It did not raise any question of what might have been the situation in a hypothetical state of facts. To this problem the words of Lord Diplock in *Mallett v. McMonagle* [1970] A.C. 166, 176 apply:

> "In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain."

In this respect this case is the same, in principle, as any other in which the state of facts existing before alleged negligence came into play has to be determined. For example, if a claimant alleges that he sustained a certain fracture in a fall at work and there is evidence that he had indeed fallen at work, but that shortly before he had fallen at home and sustained the fracture, the court would have to determine where the truth lay. If the claimant denied the previous fall, there would be evidence, both for and against the allegation, that he had so fallen. The issue would be resolved on the balance of probabilities. If the court held on that balance that the fracture was sustained at home, there could be no question of saying that since all that had been established was that it was more probable than not that the injury was not work-related, there was a possibility that it was work-related and that this possibility or chance was a proper subject of compensation.

I should add in this context that where on disputed evidence a judge reaches a conclusion on the balance of probabilities it will not usually be easy to assess a specific measure of probability for the conclusion at which he has arrived. As my noble and learned friend Lord Bridge of

Harwich observed in the course of the hearing, a judge deciding disputed questions of fact will not ordinarily do it by use of a calculator.

On the other hand, I consider that it would be unwise in the present case to lay it down as a rule that a plaintiff could never succeed by proving loss of a chance in a medical negligence case. In *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 this House held that where it was proved that the failure to provide washing facilities for the pursuer at the end of his shift had materially increased the risk that he would contract dermatitis it was proper to hold that the failure to provide such facilities was a cause to a material extent of his contracting dermatitis and thus entitled him to damages from his employers for their negligent failure measured by his loss resulting from dermatitis. Material increase of the risk of contraction of dermatitis is equivalent to material decrease in the chance of escaping dermatitis. Although no precise figures could be given in that case for the purpose of illustration and comparison with this case one might, for example, say that it was established that of 100 people working under the same conditions as the pursuer and without facilities for washing at the end of their shift 70 contracted dermatitis: of 100 people working in the same conditions as the pursuer when washing facilities were provided for them at the end of the shift 30 contracted dermatitis. Assuming nothing more were known about the matter than that, the decision of this House may be taken as holding that in the circumstances of that case it was reasonable to infer that there was a relationship between contraction of dermatitis in these conditions and the absence of washing facilities and therefore it was reasonable to hold that absence of washing facilities was likely to have made a material contribution to the causation of the dermatitis. Although neither party in the present appeal placed particular reliance on the decision in *McGhee* since it was recognised that *McGhee* is far removed on its facts from the circumstances of the present appeal your Lordships were also informed that cases are likely soon to come before the House in which the decision in *McGhee* will be subjected to close analysis. Obviously in approaching the matter on the basis adopted in *McGhee* much will depend on what is known of the reasons for the differences in the figures which I have used to illustrate the position. In these circumstances I think it unwise to do more than say that unless and until this House departs from the decision in *McGhee* your Lordships cannot affirm the proposition that in no circumstances can evidence of loss of a chance resulting from the breach of a duty of care found a successful claim of damages, although there was no suggestion that the House regarded such a chance as an asset in any sense.

By agreement of the parties we were supplied with a list of American authorities relevant to the questions arising in this appeal, although they were not examined in detail. Of the cases referred to, the one that I have found most interesting and instructive is *Herskovits v. Group Health Cooperative of Puget Sound* (1983) 664 P.2d 474, a decision of the Supreme Court of Washington en banc. In this case the claim arose in respect of Mr. Herskovits' death. He was seen at Group Health Hospital at a time when he was suffering from a tumour but this was not diagnosed on first examination. The medical evidence available suggested

that at that stage, assuming the tumour was a stage 1 tumour, the chance of survival for more than five years was 39 per cent. When he was treated later the tumour was a stage 2 tumour and the chance of surviving more than five years was 25 per cent. The defendant moved for summary judgment on the basis that, taking the most favourable view of the evidence that was possible, the case could not succeed. The Superior Court of King County granted the motion. This decision was reversed by a majority on appeal to the Supreme Court. The first judgment for the majority in the Supreme Court was delivered by Dore J. Early in his judgment he read from section 323 of the American *Restatement, Second, Torts,* vol. 2 (1965), which is in these terms:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognise as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm . . ."

After noting that the Supreme Court of Washington had not faced the issue of whether, under this paragraph, proof that the defendant's conduct had increased the risk of death by decreasing the chances of survival was sufficient to take the issue of proximate cause to the jury he said, at p. 476:

> "Some courts in other jurisdictions have allowed the proximate cause issue to go to the jury on this type of proof. . . These courts emphasised the fact that defendants' conduct deprived the decedents of a 'significant' chance to survive or recover, rather than requiring proof that with absolute certainty the defendants' conduct caused the physical injury. The underlying reason is that it is not for the wrongdoer, who put the possibility of recovery beyond realisation, to say afterward that the result was inevitable . . . . Other jurisdictions have rejected this approach, generally holding that unless the plaintiff is able to show that it was *more likely than not* that the harm was caused by the defendant's negligence, proof of a decreased chance of survival is not enough to take the proximate cause question to the jury. . . . These courts have concluded that the defendant should not be liable where the decedent more than likely would have died anyway."

To the question whether the plaintiff should be allowed, in the case before him, to proceed to a jury he returned an affirmative answer; and gave as the reason, at p. 477:

> "To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 per cent. chance of survival, regardless of how flagrant the negligence."

In support of this reasoning he referred to *Hamil v. Bashline* (1978) 481 Pa. 256; 392 A.2d 1280, a decision of the Pennsylvania Supreme Court, and said:

> "The *Hamil* court distinguished the facts of that case from the general tort case in which a plaintiff alleges that a defendant's act or

omission set in motion a force which resulted in harm. In the typical tort case, the 'but for' test, requiring proof that damages or death probably would not have occurred 'but for' the negligent conduct of the defendant, is appropriate. In *Hamil* and the instant case, however, the defendant's act or omission failed in a *duty* to protect against harm from *another source*. Thus, as the *Hamil* court noted, the fact finder is put in the position of having to consider not only what *did* occur, but also what *might* have occurred."

He goes on to quote from *Hamil*, 481 Pa. 256, 271; 392 A.2d 1280, 1287–1288:

"'Such cases by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable. Nevertheless, in order that an actor is not completely insulated because of uncertainties as to the consequence of his negligent conduct, section 323(a) [of the *Restatement, Second, Torts*] tacitly acknowledges this difficulty and permits the issue to go to the jury upon a less than normal threshold of proof.'"

He goes on, at pp. 477–478, to refer to another decision, namely *Hicks v. United States* (1966) 368 F.2d 626, as containing a succinct statement of the relevant doctrine, at p. 632, and quotes:

"'Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a *certainty* that the patient would have lived had she been hospitalised and operated on promptly.'"

He refers also to a general observation in the Supreme Court of the United States dealing with a contention similar to that argued before him by the doctors and the hospital. In *Lavender v. Kurn* (1946) 327 U.S. 645, 653 the Supreme Court said:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

He therefore concluded, at p. 479, that the evidence available which showed at maximum a reduction in the 39 per cent. chance of five years' survival to a 25 per cent. chance of five years' survival was sufficient to allow the case to go to the jury on the basis that the jury would be entitled to infer from that evidence that the delay in treatment was a proximate cause of the decedent's death. He pointed out, however, that causing reduction of the opportunity to recover (also described as a loss of chance) by one's negligence did not necessitate a total recovery against the negligent party for all damages caused by the victim's death. He held that damages should be awarded to the injured party and his family based only on damages caused directly by premature death, such as lost earnings and additional medical expenses and the like.

The approach of Dore J. bears some resemblance to the approach taken by some members of this House in *McGhee v. National Coal Board* [1973] 1 W.L.R. 1, and by Lord Guthrie in *Kenyon v. Bell*, 1953 S.C. 125.

Brachtenbach J. dissented. He warned against the danger of using statistics as a basis on which to prove proximate cause and indicated that it was necessary at the minimum to produce evidence connecting the statistics to the facts of the case. He gave an interesting illustration of a town in which there were only two cab companies, one with three blue cabs and the other with one yellow cab. If a person was knocked down by a cab whose colour had not been observed it would be wrong to suggest that there was a 75 per cent. chance that the victim was run down by a blue cab and that accordingly it was more probable than not that the cab that ran him down was blue and therefore that the company running the blue cabs would be responsible for negligence in the running down. He pointed out that before any inference that it was a blue cab would be appropriate further facts would be required as, for example, that a blue cab had been seen in the immediate vicinity at the time of the accident or that a blue cab had been found with a large dent in the very part of the cab which had struck the victim. He concluded that the evidence available was not sufficient to justify the case going to the jury and noted, at p. 491:

> "The apparent harshness of this conclusion cannot be overlooked. The combination of the loss of a loved one to cancer and a doctor's negligence in diagnosis seems to compel a finding of liability. Nonetheless, justice must be dealt with an even hand. To hold a defendant liable without proof that his actions *caused* plaintiff harm would open up untold abuses of the litigation system."

Pearson J. agreed that the appeal should be allowed but did not agree with the reasoning by which that result was supported by Dore J. Pearson J., after examining the authorities and an academic article, stated that he was persuaded that a middle course between the reasoning of Dore J. and Brachtenbach J. was correct and concluded, at p. 487: "that the best resolution of the issue before us is to recognise the loss of a less than even chance as an actionable injury." He recognised that this also required that the damage payable be determined by the application of that chance expressed as a percentage to the damages that would be payable on establishing full liability.

I have selected references to the views expressed by the judges who took part in this decision to illustrate the variety of views open in this difficult area of the law. These confirm me in the view that it would not be right in the present case to affirm the general proposition for which Mr. Whitfield contended. On the other hand, none of the views canvassed in *Herskovits'* case, 644 P.2d 474, would lead to the plaintiff succeeding in the present case since the judge's findings in fact mean that the sole cause of the plaintiff's avascular necrosis was the injury he sustained in the original fall, and that implies, as I have said, that when he arrived at the authority's hospital for the first time he had no chance

of avoiding it. Accordingly, the subsequent negligence of the authority did not cause him the loss of such a chance.

I have the impression from reading the judgments of the Court of Appeal that this aspect of the facts in the present case may not have been in the forefront of the discussion there. Much of the judgment of the Court of Appeal will remain for consideration in the future.

Lord Ackner. My Lords, this appeal, as Mr. Graeme Williams for the respondent (the plaintiff in the action) submitted, raises a short point of classification. Adopting, although somewhat adapting, the words of Dillon L.J. [1978] 2 W.L.R. 287, 298, in his short judgment the fundamental question is "What does the law regard as the damage which the plaintiff has suffered? Was it the onset of avascular necrosis or was it the loss of the chance of avoiding that condition?"

The claim, as pleaded, is a simple one for damages for personal injuries suffered as a result of negligent treatment. Paragraph 9 of the amended statement of claim alleges:

> "The plaintiff now suffers from a permanent deformity of the left hip and a loss of movement therein and wasting of the left leg with a resultant limp, none of which injuries the plaintiff would have suffered save for the aforesaid negligence of the defendants which is hereinafter set out."

To establish his cause of action, the plaintiff had to prove that the defendants (the appellants) were under the duty alleged, that they broke that duty and that as a result of that breach of duty he suffered the injuries alleged. It is, of course, axiomatic that the facts upon which liability is based must be proved on the balance of probabilities.

It is common ground that the defendants, in breach of their duty, failed to treat the plaintiff for five days and that as a consequence of that breach of duty he suffered pain during that period for which he was properly compensated by the award made by the trial judge of £150. The permanent deformity of the hip and other injuries described in the statement of claim were in an entirely separate and unrelated category and were due to the avascular necrosis of the left femoral epiphysis.

The judge explained most helpfully the mechanism by which the avascular necrosis with the resultant distortion and collapse of the epiphysis can occur [1985] 1 W.L.R. 1036, 1038–1039:

> "The femoral epiphysis (the epiphysis as I shall refer to it henceforth) is the spongy extremity of the upper femur, its surface being covered with cartilage, which slots into the cavity of the acetabulum to form the hip joint. In a child the epiphysis is connected to the neck of the femur by an epiphysial plate (sometimes called a growth plate) which is essentially a sandwich filling of cartilage between, on the upper side, the epiphysis and on the lower side the bony femoral neck. The plate exists only in a growing skeleton and indeed it enables the bone to grow; in maturity it forms bone across the gap. The major threat created by an injury such as the plaintiff's is that it will so interfere with the blood supply to the epiphysis that avascular necrosis will develop. This is a condition whereby through

lack of sufficient blood the epiphysis becomes de-mineralised, weakened and softened and thus denser, distorted and deformed. When that occurs, not only does it cause misshapenness of the joint with associated pain, restriction in mobility and general disability, but it also carries with it the virtual certainty that osteoarthritis will develop within the joint."

At the trial it was contended on the plaintiff's behalf, thereby departing from paragraph 9 of the amended statement of claim, to which I have already made reference, that the defendants' failure to diagnose and treat the injury immediately when he first attended hospital rather than when he returned five days later substantially increased the risk that avascular necrosis would develop and thus give rise to the long-term disability which resulted. The defendants contended, relying upon the expert evidence of their surgeon Mr. Bonney, that the initial injury when the plaintiff fell and thereby sustained the fracture separation of the left femoral epiphysis, was so severe that the avascular necrosis of the epiphysis was, thereafter and in any event, inevitable. It was thus argued that the delay would not have increased the risk of avascular necrosis.

The vital issue of fact which the judge had to determine was whether or not the fall left intact sufficient blood vessels to keep the epiphysis alive. If it did not, then the subsequent failure to diagnose and treat the injuries for a period of five days could not be responsible for the avascular necrosis. The judge, again most helpfully, gave a simple and short explanation of the system of blood supply to the epiphysis and the likely effect upon that supply of the injury sustained by the plaintiff when he fell. He said, at p. 1041:

> "There are in a child three sets of blood vessels to the epiphysis: those running along the back of the femoral neck, those running along the front, and those which run through the round ligament. It was common ground between the experts (a) that the blood supply along the front of the femoral neck (some 20 per cent. of the total supply) would have been ruptured by the fall when the femoral shaft rotated; and (b) that the supply through the round ligament (something less than 30 per cent. of the total) would not have been ruptured."

Thus the essential question to determine was—what was the effect of the fall upon the remaining 50 per cent. of the blood supply which was to be found in the blood vessels running along the back of the femoral neck? Mr. Bonney took the view that these blood vessels *must have been* ruptured by the fall. The plaintiff's surgeon, Mr. Bucknill, disagreed, contending that the effect of the fall was to rotate the femur externally so as to lessen the tension upon the rear vessels. He could see no good reason to conclude that these would have been severed.

The judge was unable to accept either of the competing extreme views. His conclusions were, at pp. 1040–1041:

> "(1) Even had the health authority correctly diagnosed and treated the plaintiff on 26 April there is a high probability, which I assess as

> a 75 per cent. risk, that the plaintiff's injury would have followed the same course as it in fact has, that is, he would have developed avascular necrosis of the whole femoral head with all the same adverse consequences as have already ensued and with all the same adverse future prospects. . . . (4) The reason why the delay sealed the plaintiff's fate was because it allowed the pressure caused by haemarthrosis—the bleeding of ruptured blood vessels into the joint—to compress and thus block the intact but distorted remaining vessels with the result that even had the fall left intact sufficient vessels to keep the epiphysis alive (*which, as finding (1) makes plain, I think possible but improbable*) such vessels would have become occluded and ineffective for this purpose." (Emphasis added.)

The judge was thus making clear that he accepted Mr. Bonney's opinion to this extent, viz. that the blood vessels running along the back of the femoral neck containing approximately one-half of the total blood supply must have been, *on the balance of probabilities*, ruptured by the fall.

He thus found that immediately after the fall, that is before admission to hospital and therefore *before* the duty was imposed upon the defendants properly to diagnose and treat, the epiphysis was doomed. Accordingly the judge had determined as a matter of fact, on the balance of probabilities, that the compression and blocking of the blood vessels had had no effect on the plaintiff's ultimate condition. In determining what happened in the past the court decides on the balance of probabilities. Anything that is more probable than not is treated as certainty: *Mallet v. McMonagle* [1970] A.C. 166, 176, *per* Lord Diplock.

In the result the judge had by his clear findings decided that the negligence of the defendants in failing to diagnose and treat for a period of five days had not caused the deformed left hip. The judge, in agreement with the submission made to your Lordships by counsel for the defendants, said in terms that in the end the problem came down to one of classification [1985] 1 W.L.R. 1036, 1043–1044:

> "Is this on true analysis a case where the plaintiff is concerned to establish causative negligence or is it rather a case where the real question is the proper quantum of damage?"

The judge thought, at p. 1044, that the case "hovers near the border." To my mind, the first issue which the judge had to determine was an issue of causation—did the breach of duty cause the damage alleged. If it did not, as the judge so held, then no question of quantifying damage arises. The debate on the loss of a chance cannot arise where there has been a positive finding that before the duty arose the damage complained of had already been sustained or had become inevitable.

Kitchen v. Royal Air Force Association [1958] 1 W.L.R. 563 has no relevance to this appeal. In that case there was an undoubted breach of contract which caused the plaintiff to suffer more than nominal damages. By reason of the solicitor's negligence, she had lost a worthwhile action. What the court there had to do was to value that action. It is, of course, obvious that it is not only actions that are bound to succeed that have a

A value. Every action with a prospect of success has a value and it is a familiar task for the court to assess that value where negligence has prevented such an action being brought. Again, *Chaplin v. Hicks* [1911] 2 K.B. 786, strongly relied upon by the plaintiff, provides no assistance. In that case a young lady actress-to-be had made a contract with the defendant under which she had an opportunity of appearing in a competition in which, if successful, she would have obtained a B remunerative engagement as an actress. In the words of Fletcher Moulton L.J., at p. 797:

> "The contract gave the plaintiff a right of considerable value, one for which many people would give money; therefore to hold that the plaintiff was entitled to no damages for being deprived of such a right because the final result depended on a contingency or chance C would have been a misdirection."

In a sentence, the plaintiff was not entitled to any damages in respect of the deformed hip because the judge had decided that this was not caused by the admitted breach by the defendants of their duty of care but was caused by the separation of the left femoral epiphysis when he fell some 12 feet from a rope on which he had been swinging. D

On this simple basis I would allow this appeal. I have sought to stress that this case was a relatively simple case concerned with the proof of causation, upon which the plaintiff failed, because he was unable to prove, on the balance of probabilities, that his deformed hip was caused by the defendants' breach of duty in delaying over a period of five days a proper diagnosis and treatment. Where *causation* is in E issue, the judge decides that issue on the balance of the probabilities. Unless there is some special situation, e.g. joint defendants where the apportionment of liability between them is required, there is no point or purpose in expressing in percentage terms the certainty or near certainty which the plaintiff has achieved in establishing his cause of action.

Once liability is established, on the balance of probabilities, the loss which the plaintiff has sustained is payable in full. It is not discounted F by reducing his claim by the extent to which he has failed to prove his case with 100 per cent. certainty. The decision by Simon Brown J. in the subsequent case of *Bagley v. North Herts Health Authority*, reported only in (1986) 136 N.L.J. 1014, in which he discounted an award for a stillbirth, because there was a five per cent. risk that the plaintiff would have had a stillborn child even if the hospital had not been negligent, G was clearly wrong. In that case, the plaintiff had established on a balance of probabilities, indeed with near certainty, that the hospital's negligence had caused the stillbirth. Causation was thus fully established. Such a finding does not permit any discounting—to do so would be to propound a wholly new doctrine which has no support in principle or authority and would give rise to many complications in the search for mathematical or statistical exactitude.

H Of course, where the cause of action has been established, the assessment of that part of the plaintiff's loss where the future is uncertain involves the evaluation of that uncertainty. In *Bagley*, if the child had, by reason of the hospital's breach of duty, been born with brain injury,

which could lead in later life to epilepsy, then it would have been a classic case for the evaluation, inter alia, of the chance of epilepsy occurring and discounting, to the extent that the chance of that happening fell below 100 per cent., what would have been the sum of damages appropriate if epilepsy was a certain consequence.

I would accordingly allow the appeal by reducing the damages awarded to the plaintiff by £11,500, being the amount awarded by the trial judge for the "lost chance of recovery," together with the amount of any interest on that sum which is included in the award.

Lord Goff of Chieveley. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner. For the reasons they give, I too would allow the appeal.

Appeal allowed.
Order of Court of Appeal set aside save as to costs.
Order of Simon Brown J. of 15 March 1985 varied to extent that sum awarded to plaintiff reduced by £11,500 and amount of any interest on that sum included in award.
Health authority to pay plaintiff's costs in House of Lords.
Application by health authority for their costs to be paid out of legal aid fund refused with costs.

Solicitors: Hempsons; Stephens & Scown, St. Austell for Lloyd Howorth & Partners, Maidenhead.

M. G.

[HOUSE OF LORDS]

THOMAS . . . . . RESPONDENT

AND

UNIVERSITY OF BRADFORD . . . . . APPELLANT

1986 Dec. 1, 2, 3, 4, 8;
1987 Feb. 26

Lord Bridge of Harwich,
Lord Brandon of Oakbrook,
Lord Griffiths, Lord Mackay of Clashfern
and Lord Ackner

Education—University—Visitor's jurisdiction—Dismissal of lecturer—Claim for declaration that dismissal ultra vires—Alleged failure by university to follow procedures laid down in university statutes and regulations—Application for stay of proceedings pending consideration by visitor—Whether dispute within exclusive jurisdiction of visitor—Subsequent application to strike out proceedings

In 1973 the plaintiff was appointed a lecturer in sociology at the University of Bradford and thus became an employee of the university under a contract of service, the holder of office in and membership of the university, which by Royal Charter was a corporation within a visitor's jurisdiction, and a corporator. The university purported to dismiss the plaintiff in 1983 and she brought an action claiming, inter alia, a declaration that the university's decision to dismiss her was ultra vires, null and void by reason of non-compliance with the disciplinary rules and procedures contained in the university's charter, statutes, ordinances and regulations, and incorporated in the contract; she also claimed damages for breach of contract or alternatively arrears of salary. The university applied for an order to stay the proceedings under R.S.C., Ord. 18, r. 19, or the court's inherent jurisdiction, on the ground that the proceedings concerned purely domestic matters within the visitor's exclusive jurisdiction and for the stay to continue until the plaintiff should have petitioned the visitor and the visitor should have adjudicated upon those matters. The judge refused the application. On appeal, the Court of Appeal dismissed the appeal.

On the university's appeal to the House of Lords, leave having been granted to the university to amend the relief sought to that of an order to strike out the statement of claim on the ground that the court had no jurisdiction to entertain the action:—

Held, allowing the appeal, that where the dispute related to the correct interpretation and fair administration of the domestic laws of the university, its statutes and its ordinances, it fell within the jurisdiction of the visitor and not the courts of law notwithstanding that its resolution would affect the plaintiff's contract of employment for she was not relying upon a contractual obligation apart from an obligation of the university to comply with its own domestic laws; that, accordingly, her claim fell within the exclusive jurisdiction of the visitor, subject to the supervisory jurisdiction of the High Court, and therefore the court lacked jurisdiction in the first instance to intervene and the plaintiff's action should be struck out (post, pp. 807D-E, 821A-E, 825D-E, 828A-B).

Patel v. University of Bradford Senate [1978] 1 W.L.R. 1488; *In re Wislang's Application* [1984] N.I. 63 and *Hines v. Birkbeck College* [1986] Ch. 524 approved.

Casson v. University of Aston in Birmingham [1983] 1 All E.R. 88 considered.

Per curiam. The visitor in the course of his supervisory jurisdiction must be entitled, in order to ensure that the domestic law is properly applied, to redress any grievance that has resulted from its misapplication. This redress may involve ordering the payment of arrears of salary where the visitor decides that the employment has not been determined, or compensation where the complainant has accepted the wrongful repudiation of his contract of employment (post, pp. 807D-E, 823F—824B, 825D–E, 828B–D).

Decision of the Court of Appeal [1986] Ch. 381; [1986] 2 W.L.R. 111; [1986] 1 All E.R. 217 reversed.

The following cases are referred to in their Lordships' opinions:

Attorney-General v. Dedham School (1857) 23 Beav. 350
Attorney-General v. Magdalen College, Oxford (1847) 10 Beav. 402
Attorney-General v. Talbot (1747) 3 Atk. 662; 1 Ves.Sen. 78
Berkhamsted Free School, Ex parte (1813) 2 Ves. & Bea. 134
Casson v. University of Aston in Birmingham [1983] 1 All E.R. 88
Chichester (Bishop of) v. Harward and Webber (1787) 1 Durn. & E. 650
Green v. Rutherforth (1750) 1 Ves.Sen. 462
Herring v. Templeman [1973] 2 All E.R. 581; [1973] 3 All E.R. 569, C.A.
Hines v. Birkbeck College [1986] Ch. 524; [1986] 2 W.L.R. 97; [1985] 3 All E.R. 156
Kirkby Ravensworth Hospital, Ex parte (1865) 15 Ves. 305
Murdoch University v. Bloom and Kyle [1980] W.A.R. 193
Norrie v. University of Auckland Senate [1984] 1 N.Z.L.R. 129
Patel v. University of Bradford Senate [1978] 1 W.L.R. 1488; [1978] 3 All E.R. 841
Philips v. Bury (1694) Skin. 447; 1 Ld.Raym. 5; Holt K.B. 715
Reg. v. Bishop of Chester (1791) 1 W.Bl. 22
Reg. v. Dean and Chapter of Chester (1850) 15 Q.B. 513
Reg. v. Hertford College, Oxford (1878) 3 Q.B.D. 693, C.A.
Rex v. Bishop of Ely (1794) 5 Durn. & E. 475
Rex v. Dunsheath, Ex parte Meredith [1951] 1 K.B. 127; [1950] 2 All E.R. 741, D.C.
St. John's College, Cambridge v. Todington (1757) 1 Burr. 158
Thomson v. University of London (1864) 33 L.J. Ch. 625
Thorne v. University of London [1966] 2 Q.B. 237; [1966] 2 W.L.R. 1080; [1966] 2 All E.R. 338, C.A.
Whiston v. Dean and Chapter of Rochester (1849) 7 Hare 532
Wislang's Application, In re [1984] N.I. 63

The following additional cases were cited in argument:

Balfour v. Balfour [1919] 2 K.B. 571, C.A.
Bell v. University of Auckland [1969] N.Z.L.R. 1029
Eden v. Foster (1725) 2 P.Wms. 325
Gunton v. Richmond-upon-Thames London Borough Council [1981] Ch. 448; [1980] 3 W.L.R. 714; [1980] I.C.R. 755; [1980] 3 All E.R. 577, C.A.

Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329; [1952] 1 All E.R. 1175, C.A.
Reg. v. British Broadcasting Corporation, Ex parte Lavelle [1983] 1 W.L.R. 23; [1983] I.C.R. 99; [1983] 1 All E.R. 241
Rex v. Bland (1740) 7 Mod. 355
Vanek v. Governors of the University of Alberta [1975] 5 W.W.R. 429

Appeal from the Court of Appeal.

This was an appeal by the defendant, the University of Bradford, from the judgment dated 30 October 1985 of the Court of Appeal (Fox and Lloyd L.JJ. and Sir George Waller) dismissing an appeal by the university from the judgment and order dated 5 February 1985 of Whitford J. refusing an application by the university for stay of the action brought by the plaintiff, Brenda Thomas, pending reference of various matters to the visitor of the university.

The facts are stated in the opinion of Lord Griffiths.

Leolin Price Q.C. and *Hubert Picarda* for the appellant, University of Bradford. The question concerning the jurisdiction of a university visitor is one of very great interest to universities throughout the Commonwealth. The respondent, Miss Thomas, became with effect from 1 October 1973 (i) a member of the academic staff and lecturer in sociology at the university (ii) an employee of the university under a contract of service and (iii) the holder of an office in and a member of the university within the meaning of the charter and statutes. The decision to dismiss Miss Thomas was taken by the council of the university on 10 February 1983. There is no evidence or pleading as to the precise nature of the dispute but, as mentioned in the judgment of Fox L.J. in the Court of Appeal, it related to the questions with whom and under whose direction Miss Thomas was to work. There is no evidence or pleading that the case of Miss Thomas was or is that her conduct did not justify removal under statute 30. Her case was and is simply that the correct procedure was not followed.

In September 1984 Miss Thomas commenced proceedings in the Chancery Division and subsequently the university applied for an order under R.S.C., Ord. 18, r. 19, or under the inherent jurisdiction of the court, that all further proceedings in the action might be stayed on the ground that the matters pleaded in paragraphs 1–10 of the statement of claim were matters which fall within the exclusive jurisdiction of the university visitor and that such a stay of the proceedings should extend until the plaintiff should have petitioned the visitor in relation to the matter set forth in those paragraphs and the visitor should have adjudicated thereon. The university would now seek an order that the statement of claim be struck out on the ground that the court has no jurisdiction to entertain the action. In relation to matters of procedure Miss Thomas is bound by the internal regulations of the university which provide as a last resort an appeal to the visitor. This is an exclusive jurisdiction in which the courts have no part. In *Hines v. Birbeck College* [1986] Ch. 524 Hoffmann J. declined to follow the decision of Whitford J. in the present case.

Exclusive jurisdiction of the visitor. Where there is a dispute which affects membership of the university and the complaint of the member is one which makes the allegation that the university has not faithfully and properly followed its prescribed procedures, that is a matter to be determined under the procedures laid down under the university statutes. The jurisdiction of the visitor is recognised as exclusive, that is, the courts do not assert jurisdiction where a matter comes within the jurisdiction of the visitor. The university concedes that there may be issues arising out of the contract of employment of a member of the university which do not involve an interpretation or the application of the charter, statutes ordinances or regulations of the university. Such matters would not come within the exclusive jurisdiction of the visitor, for example, a claim by a university lecturer for back payment of salary. For the justification of the present existence of the visitatorial jurisdiction the judgment of Sir Robert Megarry V.-C. in *Patel v. University of Bradford Senate* [1978] 1 W.L.R. 1488, 1499 et seq., is adopted.

It is established by authorities going back over many centuries that in all eleemosynary foundations, of which a university is an example, there is a functionary called the visitor whose duty is to supervise the government and regulation of the foundation and to see that the private laws given by the founder to his foundation for its good government are observed. In this supervisory capacity he possesses a jurisdiction to hear and determine disputes which may arise within the foundation, and to enforce and interpret the private laws of the founder as enshrined in the statutes, ordinances and regulations of the foundation. The classic statement of principle is that of Holt C.J. in *Philips v. Bury* (1694) Skin. 447, 485, whose dissenting judgment was upheld by the House of Lords. Reliance is also placed on the well known statement of Sir Samuel Romilly in his argument in *Ex parte Kirkby Ravensworth Hospital* (1808) 15 Ves. 305, 311, that "A visitor is . . . a judge, not for the single purpose of interpreting laws, but also for the application of laws, that are perfectly clear: requiring no interpretation; and, farther for the interpretations of questions of fact; involving no interpretation of laws." Where it can be shown in a particular case that there has been an excess of jurisdiction by the visitor judicial review will lie. This was accepted by Holt C.J. in *Philips v. Bury*, Skin 447. But subject to this exception, where the visitor has jurisdiction it is an exclusive jurisdiction and the courts will not hear appeals on the merits. Thus Lord Mansfield C.J. observed in *St. John's College Cambridge v. Todington* (1757) 1 Burr. 158, 200, that "it is now settled and established, (since the case of *Philips v. Bury* in Dom.Proc.) 'that the jurisdiction of the visitor is summary and without appeal from it'." See also *Rex v. Bishop of Chester* (1747) 1 Wm.Bl. 22, 26, *per* Wright J. A good example of the application of the principle is *Reg. v. Dean and Chapter of Chester* (1850) 15 Q.B. 513, 520.

A landmark in the development of this branch of the law is *Whiston v. Dean and Chapter of Rochester* (1849) 7 Hare 532. For a description of this case and a summary of the litigation instituted by the plaintiff: see Smith, "The Exclusive Jurisdiction of the University Visitor" (1981) 97 L.Q.R. 610, 625–626.

A The Court of Appeal fell into error in holding that a contractual claim for damages must inevitably fall outside the visitor's jurisdiction, even where it is between a corporator and his or her university. No previous English or Northern Ireland decision has gone that far. Indeed, the dictum of Kindersley V.-C. in *Thomson v. University of London* (1864) 33 L.J. Ch. 625, 634, suggests the contrary, namely, that contracts between corporator and university involving exclusively internal or B domestic matters were within the exclusive jurisdiction of the visitor. Their Lordships were referred to a series of articles about the Court of Appeal decision in this case, namely (1986) 136 N.L.J. 567–570; 665–666 (Dr. Peter Smith).

Rex v. Dunsheath, Ex parte Meredith [1951] 1 K.B. 127, 131, 132, 134 and *Thorne v. University of London* [1966] 2 Q.B. 237, 242, are C recent cases where the courts have refused to intervene in matters within the province of the visitor. The position in the modern law in well summed up by Sir Robert Megarry V.-C. in *Patel v. University of Bradford Senate* [1978] 1 W.L.R. 1488, 1493E: "On the authorities it seems to be clear that the visitor has a sole and exclusive jurisdiction, and that the courts have no jurisdiction over matters within the visitor's jurisdiction." The judgment of Brightman J. in *Herring v. Templeman* D [1973] 2 All E.R. 581, affirmed by the Court of Appeal on different grounds [1973] 3 All E.R. 569, is authority for the proposition that an allegation of breach of natural justice in any university proceedings below the level of the visitor is a matter for the internal procedure of the university. It is only if there is a breach of natural justice in proceedings before the visitor himself that the complainant can apply to E the High Court for judicial review.

Membership of the University. Miss Thomas by becoming a member of the academic staff of the university subjected herself to the statutes, ordinances and regulations of the university. Her position is to be contrasted with that of, for example, secretaries, typists, porters and gardeners employed by the university. Reliance is placed on the dictum of Kelly L.J. in *In re Wislang's Application* [1984] N.I. 63, 81, F " . . . the authorities show . . . that matters may well be in breach of a contract of employment, yet within visitatorial jurisdiction, if those matters are of an internal domestic character or touch upon the interpretation or execution of private rules and regulations of the university." In the present case, membership and employment at the university are co-terminous and therefore the termination of the contract G of employment ipso facto involves termination of membership of the university and therefore questions arising therefrom come peculiarly within the statutes, ordinances and regulations of the university.

A major example of matters which *do not* go up through the visitatorial procedure are any rights as between the corporation and persons who are non-corporators. The university concedes that the visitatorial jurisdiction does not oust the statutes of the realm. Further, H it is not disputed that such matters as health and safety regulations applicable to laboratories and the kitchens of colleges of a university fall outside the purview of the visitor. But on the central issue in this appeal Hoffmann J., applying established law, in *Hines v. Birkbeck College*

[1986] Ch. 524, came to the opposite conclusion to that of Whitford J. in the present case. A

As to *Casson v. University of Aston in Birmingham* [1983] 1 All E.R. 88, where Lord Hailsham of St. Marylebone L.C. gave a decision in his capacity as visitor of the university, the present type of argument does not appear to have been put before him as it was in *Hines* case [1986] Ch. 524, and in the present case before Whitford J. The exclusivity of the courts' jurisdiction in relation to matters of contract to which the Lord Chancellor adverted is not of assistance here, and in any event, in the circumstances it was obiter. B

It is emphasised that the judgment of Whitford J. [1986] Ch. 381, is contrary to a long line of established authority. Error in it arises from dividing matters of contract from membership of the university. But it is under her contract that Miss Thomas voluntarily became a member of the university and therefore became subject to its statutes, ordinances and regulations and therefore matters of dispute arising out of the contract come under the procedures laid down by the statutes which in the last resort give recourse to the visitor. C

Commonwealth authority. Bell v. University of Auckland [1969] N.Z.L.R. 1029 recognises (a) the exclusivity of the jurisdiction of the visitor where it is a matter relating to the domestic law of the university, and (b) that there can be a claim for damages if it covers that part of an agreement which does not cover the domestic law of the university. *Vanek v. Governors of the University of Alberta* [1975] 5 W.W.R. 429 supports the proposition that the enforcement of the regulations or statutes of the university are within the exclusive jurisdiction of its visitor. The question then arises: Has there been fairness within the procedure laid down by the domestic law? This in the first place is for the visitor to determine and not the courts. It is only if the visitor himself has acted unfairly that his actions are subject to judicial review. In *Murdoch University v. Bloom and Kyle* [1980] W.A.R. 193, the Supreme Court of Western Australia held that the visitor has jurisdiction over all matters relating to the internal affairs of the corporation but the judgment of Wallace J. is to be preferred in that he held that both claims in the plaintiff's petition were within the jurisdiction of the visitor in that case. As to *Norrie v. Auckland University Senate* [1984] 1 N.Z.L.R. 1029, it is distinguishable. The New Zealand Court of Appeal based its decision on the construction of New Zealand Statutes and held that the courts and the visitor had concurrent jurisdiction. D E F

Availability to the visitor of the power to award compensation for damages. The wide power given to visitors in relation to domestic disputes within the domus includes the power to award compensation to a wronged corporator as part of the "power of judging and giving relief upon complaints and appeals": *St. John's College Cambridge v. Toddington*, 1 Burr. 158, 202. Re-instatement would inevitably carry arrears of pay and the plenary powers enjoyed by a visitor over domestic matters would enable him to award further compensation as well as costs. On that footing it would be appropriate for the House to direct that the action of Miss Thomas should be wholly struck out. In *Thorne v. University of London* [1966] 2 Q.B. 237, there was a claim for G H

damages. It was dismissed on the ground that it was wholly misconceived. But the court did not suggest that the visitor could not in an appropriate case award compensation. Likewise, in *Patel v. University of Bradford Senate* [1978] 1 W.L.R. 1488, the writ contained a claim for exemplary damages. That was not an obstacle to striking out the whole of the claim. Again, in *Herring v. Templeman* [1973] 2 All E.R. 581 the fact that there was a claim for damages proved not to be a bar to striking out the whole of the statement of claim. In *Murdoch University v. Bloom and Kyle* [1980] W.A.R. 193, 198, Burt C.J. held that he saw no reason why if the visitor had jurisdiction over a complaint he would not also have power to award damages where appropriate. The opinions to the contrary in *Casson v. University of Aston in Birmingham* [1983] 1 All E.R. 88, and in *In re Wislang's Application* [1984] N.I. 63 and in Dr. Smith's article, 97 L.Q.R. 610, 642, are wrong on this point.

Picarda following. The Crown is visitor of many universities. All modern universities, being created by Royal Charter, are Royal foundations, and the Crown is deemed to be the visitor thereof unless the Crown has appointed a special visitor. Where the visitor is the Sovereign in person and no special appointment has been made the Sovereign's visitatorial powers are exercised by the Lord Chancellor: see Dr. J. W. Bridges' article, "Keeping Peace in the Universities: the role of the visitor" (1970) 86 L.Q.R. 531, 534, 535. If a dispute arises in these instances an alternative to the dispute being heard by the Lord Chancellor is that it should be heard by commissioners appointed for the purpose under the Great Seal: see *Shelford, Law of Mortmain* (1836); *Eden v. Foster* (1725) 2 P.Wms. 325 and *Tudor on Charities*, 7th ed. (1984), 323.

Michael Beloff Q.C. and *Brian Langstaff* for the plaintiff, Miss Thomas. The general submission is that the enforcement of any rights arising out of the contract of service between an employee of the university where that employee is a member of the university are matters for the ordinary courts of law and not for the jurisdiction of the visitor. The issue raised in this appeal is not as to the existence or exclusivity of the visitatorial jurisdiction but as to its extent. As Hoffmann J. observed in *Hines v. Birkbeck College* [1986] Ch. 524, 542, 543, the law on the ambit of visitors' jurisdiction is in an unsatisfactory state and as Woodhouse P. observed in *Norrie v. Auckland University Senate* [1984] 1 N.Z.L.R. 129, 134, the law is in a state of uncertainty on the matter. Therefore, any suggestions that there is an unbroken line of authority which would dispose of this appeal in the university's favour is unfounded. The present type of case has only very recently been ventilated in the courts: see Dr. Peter Smith's article, "Visitation of the Universities: a Ghost from the Past—1" (1986) 136 New Law Journal 484–486.

Once one is in the realm of contract the jurisdiction of the visitor is pro tanto diminished. The advance of contract has pro tanto diminished the jurisdiction of the visitor in matters of status. It would be an anomalous situation if a person, simply because he was a member of a university, was denied access to the courts although other employees of the university were not denied that right. This anomaly is highlighted if

the present issue is to be founded on the decision in *Philips v. Bury*, Skin. 447, decided some 290 years ago, where the question of contract was never raised.

Reliance is placed on the following propositions: (1) The plaintiff's claim is in respect of the breach of the terms of her contract of service in the context of which she seeks, inter alia, monetary redress. (2) Such a claim is prima facie within the jurisdiction of the High Court. (3) The plaintiff has not agreed to subject herself, inter alia, by virtue of the statutes, ordinances and regulations of the university to the jurisdiction of the visitor on matters relating to rights under that contract. (4) While it is accepted that there are matters over which the visitor has jurisdiction and that in respect of them the jurisdiction is exclusive (subject to the remedy of judicial review) that jurisdiction supplements and does not supplant the jurisdiction of the High Court in so far as it relates to issues concerning the general law of the land. (5) In particular, the visitatorial jurisdiction does not extend to a case where a claim is made for breach of the express provisions of a contract or the rules of natural justice implied into such a contract for one or more of the following reasons: (i) such claims are based on the general law of the land distinct from the laws of the university; (ii) claims of that nature are based on contract and not status; (iii) the claims do not relate to mere matters of management, and (iv) they do not relate to matters inherently not justiciable by the courts. (6) To the extent that the question is one of precedent it is an open issue before this House and accordingly can be decided on reasons of policy. On policy grounds it should be determined that the jurisdiction of the visitor does not extend to contractual claims because to allow the visitor jurisdiction over claims of that nature (a) is inconsistent with the fundamental principle that persons are entitled to have access to the courts of law to determine their claims in the absence of statutory provision or the agreement of the parties to the contrary; (b) will result in an invidious distinction between employees who are members of the university and those who are not; (c) could result in a diminution rather than an addition to a person's ordinary contractual rights; (d) would deny such members remedies available to the court but not to the visitor; (e) could result in inconsistent decisions on the self-same contract depending on the nature or timing or the claim under it.

(1) The statement of claim establishes that there is a claim for monetary redress. (2) The courts are very familiar with the proper construction of a contract and the procedural safeguards arising thereunder and with determining whether those safeguards have been breached. (3) There is no suggestion in the present case that the plaintiff actually and specifically agreed to the visitor determining any matters of dispute arising out of her contract. It is notable that no such point is pleaded in the defence and there is no positive assertion that the visitor should have jurisdiction over these matters. (4) On this branch of the argument attention is drawn to Bridge, L.Q.R. 531, 540–541. Reliance is placed on the article of Dr. Peter Smith: "The Exclusive Jurisdiction of the University Visitor" (1981) 97 L.Q.R. 610, 614–615, 635, and in particular, the passage at pp. 642–643, where he states his conclusion

A that the visitor can have no jurisdiction over a contractual relationship which is governed by the general laws of the realm. *Rex v. Bland* (1740) 7 Mod. 355, 356, is authority for the proposition that the visitor has no jurisdiction where any laws of the Kingdom are involved.

Where the dispute between a member and the university relates to questions of contract the matter cannot properly be called purely domestic or in the realm of the internal arrangements and dealings with B regard to the government and management of the university. The plaintiff's claim relates to her contract of employment which imposes upon her personal obligations and gives her personal rights which arise exclusively out of the terms of such contract. Her claim is based upon the general law of contract and upon rights created by the application of such general law to the particular agreement into which she and the C defendant university entered. The Court of Appeal was right in holding that her status of membership of the university was incidental to the contract of employment and not vice versa: see *per* Lloyd L.J. [1986] Ch. 381, 412G—413A.

(5) In *Philips v. Bury*, Holt K.B. 715, 723–724, Holt C.J. gave two reasons for the existence of the visitatorial jurisdiction. He drew a distinction between those bodies founded for public advantage and those D founded for private advantage. Moreover, the Chief Justice derived the visitor's exclusive rights from the proprietary rights that the founder of the corporation enjoyed. These two reasons give no sound rationale in modern times. In particular, it would be extraordinary nowadays to contend that the university was founded for private advantage. Holt C.J.'s explanation does not suffice at the present time to give a university E visitor jurisdiction over contractual matters. Of course there are certain matters which simply are not justiciable by the courts, for example, the award of university degrees or medals. This is analogous to the situation stated by Atkin L.J. in *Balfour v. Balfour* [1919] 2 K.B. 571, 578, that there are certain domestic matters which do not result in enforceable legal relationships between the parties. The position is not that there is another jurisdiction which has exclusive jurisdiction over the matters in F question but that the matters themselves are not justiciable by the courts. As to Holt C.J.'s concluding remarks (i.e. "I cannot sever the charity from the yoke") in *Philips v. Bury*, Holt K.B. 715, 729, these again have no bearing on matters of contract for the Chief Justice in that passage was directing his observations to persons who, as recipients of charity, must accept the visitor's authority.

G As to *Rex v. Bishop of Ely* (1794) 5 Durn. & E. 475, the basis of that decision was that the court was ignorant of private statutes. This shows an aspect of the rationale of the exclusive jurisdiction of the visitor which has long since disappeared. As to the reliance placed on the statement of Sir Samuel Romilly in *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305, 311, it is to be remembered that it was only a statement made in the course of argument by Sir Samuel as counsel in H that case. Further, it does not answer the question as to the extent of the visitor's jurisdiction: see *per* Lloyd L.J. [1986] Ch. 381, 413H. As to *Reg. v. Bishop of Chester*, 1 W.Bl. 22; *Reg. v. Dean and Chapter of Chester*, 15 Q.B. 513 and *Whiston v. Dean and Chapter of Rochester*, 7

Hare 532, the observations of Sir George Waller [1986] Ch. 381, 422E are adopted; the courts in those cases treated them as relating to matters of status.

Thomson v. University of London, 33 L.J.Ch. 625 is an important case for it is the start of the modern line of cases. The dividing line between the exclusive jurisdiction of a visitor and the jurisdiction of the courts is that propounded by Kindersley V.-C., at p. 634 where it is plain that the Vice-Chancellor was assigning to the court certain contracts between the university and members of the university in addition to contracts between the university and non-corporators, but that he was assigning to the visitor contracts relating to the mere management of the domus.

The modern cases. In *Reg. v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127, the issue was whether a mandamus would go in respect of a refusal by the Chairman of convocation to call an extraordinary meeting on the ground that the motion relating thereto as drafted was out of order. The Divisional Court held that the matter was essentially for the visitor because it was a domestic matter. The observations of Lord Goddard C.J., at p. 132, are obiter. There is nothing in that passage that indicates that Lord Goddard was considering allegations of breaches of contractual rights. Again, in *Thorne v. University of London* [1966] 2 Q.B. 237, it was held that the matter was essentially for the visitor because it was a domestic question, namely, a claim arising out of the marking of examination papers.

As to *Herring v. Templeman* [1973] 2 All E.R. 581, in the Court of Appeal [1973] 3 All E.R. 569, the question at issue was treated as one of contract. *Patel v. University of Bradford Senate* [1978] 1 W.L.R. 1488 has to be viewed in relation to the circumstances that it related to examination results. It is not disputed that such matters are not justiciable by the courts: see *per* Whitford J. [1986] Ch. 381, 387F–G.

In re Wislang's Application [1984] N.I. 63 was a proceeding by way of judicial review. Kelly L.J. inverts the test propounded by Kindersley V.-C. in *Thomson v. University of London*, 33 L.J.Ch. 625. It is emphasised that it is only if matters relate solely to the mere management of the affairs of the university that the issue is properly within the visitatorial jurisdiction. Accordingly, *In re Wislang's Application* [1984] N.I. 63 should not be followed. The respondent relies upon and adopts as part of the present argument the decision of Lord Hailsham of St. Marylebone L.C. on behalf of the visitor in *Casson v. University of Aston in Birmingham* [1983] 1 All E.R. 88, 91, paras. 11, 12, and 14, where the Lord Chancellor accepts the proposition in an article by Dr. Peter Smith in 97 L.Q.R. 610 that the visitor can have no jurisdiction in any matter governed by the common law, for example, the law of contract. As regards *Hines v. Birkbeck College* [1986] Ch. 524, it was wrongly decided.

The Commonwealth cases. In *Vanek v. Governors of the University of Alberta* [1975] 5 W.W.R. 429, 434, 442, there are two passages in the judgment which suggest that if the contractual aspect of the case had been before the court different considerations would have applied. As to *Murdoch University v. Bloom and Kyle* [1980] W.A.R. 193, it is

A conceded that the claim there was founded on a contract of service and was not related to the university statutes or regulations. However, that factor, although relevant to the majority judgment, was not decisive of it. In *Norrie v. University of Auckland Senate* [1984] 1 N.Z.L.R. 129, 135, lines 30 to 50, Woodhouse P. was clearly impressed by policy considerations but his observations on the nature of modern universities is pertinent to the present case. As to the judgment of Cooke J., at B p. 140, the weight of English authorities does not support it.

To summarise the state of jurisprudence up to the present time on the issue on this appeal: (i) the case law before the end of the 19th century established a principle that where in any dispute between a corporator and a corporation a question arose concerning the general law of the land the visitor alone was concerned with it. (ii) Those cases C were concerned only with questions of status and not of contract. (iii) The first case cited to the House which included a question of contract was the *Thomson* case, 33 L.J.Ch. 625, where the Vice-Chancellor identified two types of contract cases. In so far as the Vice-Chancellor there contemplated that there was any claim in contract within the visitor's jurisdiction he was wrong. Alternatively, service contracts are exclusively within the court's jurisdiction. (iv) Since that time there has D been one case in which it has been stated that all claims in contract are for the courts: *Casson v. University of Aston in Birmingham* [1983] 1 All E.R. 88.

To hold that the visitor's jurisdiction extends to contractual claims would be inconsistent with the basic principle of the common law that in the absence of statutory provision or the express agreement of the E parties claims in contract are for the courts: see *Lee v. Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 341 *per* Denning L.J. This statement of the law is still valid, subject to the exception that the Arbitration Act 1979 allows parties to agree to go to arbitration instead of seeking recourse in the courts.

To assign contractual disputes between corporator and corporation to the visitor but disputes between a non-corporator and a corporation to F the courts would be to create an anomaly. It raises the question: Why should a typist in the typing pool in the administrative offices of the university have recourse to the courts whilst a university lecturer is denied that right? Further, the courts have procedural powers which are not open to the visitor under his jurisdiction for example, the power to order discovery.

G As to the inferences to be drawn from the status of a member of a university: status cannot derogate from contractual rights, rather it gives additional rights. The common law recognises that where a person has a given status he enjoys the benefit of the rules of natural justice: status can be protected by way of the process of judicial review.

On the issue of damages, there is no authority in favour of the proposition that a visitor can award damages. None of the reported H cases through the centuries give an instance of an award of damages by a visitor. *Casson v. University of Aston in Birmingham* [1983] 1 All E.R. 88, *In re Wislang's Application* [1984] N.I. 63 and *Hines v. Birkbeck College* [1986] Ch. 524 all contain express statements that a university

visitor cannot award damages. In particular, reliance is placed on the statement of Lord Hailsham of St. Marylebone L.C. in the *Casson* case [1983] 1 All E.R. 88, 91: "After considerable research, I have been unable to find any precedent in the long history of visitatorial powers in which a visitor has made such an order [for damages] and in my view he has no such power." *Thorne v. University of London* [1966] 2 Q.B. 237, and *Herring v. Templeman* [1973] 2 All E.R. 581, do not support the appellants' contention. All they decided was that the claims in question came within the visitor's jurisdiction and leave the claimant to what redress the visitor can award. As to the observations of Burt C.J. in *Murdoch University v. Bloom and Kyle* [1980] W.A.R. 193, 198, there is nothing in the authorities to support the Chief Justice's assertion in that passage that a visitor can award damages. The present appellant's contention to the contrary is no more than an assertion.

On the powers of a university visitor generally, the visitor cannot compel the university to comply with his decision. He can punish for non-compliance but he cannot compel the university to carry out the terms of his award: see Smith (1986) New Law Journal, pp. 666–667. It appears to be accepted that there are certain claims in contract between a corporator and a corporation that are only justiciable by the courts, for example, whether the corporator's salary has in fact been paid, or any question arising from the original letters of appointment on the amount of salary that was to be paid. But difficulties could arise in the case of anticipatory breach of an agreement to employ which would only be justiciable by the courts, for at that stage the claimant would not be a member of the university. Further, there could be a conflict between the decision of an industrial tribunal and the decision of the visitor. On the judicial review of universities see the reference in the *Norrie* case [1984] 1 N.Z.L.R. 129, 133, to the article by J. L. Caldwell, "Judicial Review of Universities—The Visitor and the Visited" (1982) Canterbury L.R. 307.

In conclusion, it cannot be suggested that the present argument, in effect, abolishes the role of the university visitor. There are many internal matters relating to the construction of the statutes and ordinances which are within the visitor's province: see the article by Dr. J. W. Bridge, 86 L.Q.R. 531, 535. Further, there are various grievances which might legitimately go to the visitor; for example, if it was discovered that a university was operating a quota system in relation to university entrance or that it was proposed to alter the pass mark for obtaining a degree.

Price Q.C. in reply. It would be quite wrong to assume from the language used in *Philips v. Bury*, Skin. 447, that Holt C.J. did not recognise that the courts did have some control, not on the merits of a particular claim but by way of prerogative writ.

As to the contention that the early cases are based on status and that the concept of a contractual relationship is modern: see *Holdsworth's History of English Law*, vol. 2, 4th ed., (1936) p. 461, which shows that the legislation of the late 14th century recognised that the relationship between master and servant was based not on status but on contract.

Although the founder of the corporation in question may be the creator of the visitor, the visitor's powers arise from the common law. It is part of public law that there are private corporations of an eleemosynary character. In conclusion, by taking employment as a member of the academic staff of the university, by becoming a member of the university, Miss Thomas became subject to all the statutes and ordinances of the university. It follows that if any dispute arises relating to the constitution of the university, such a dispute is to be governed by the private procedure laid down by that constitution—in the last resort there being recourse to the visitor. It is only if the visitor acts contrary to the rules of natural justice that Miss Thomas has access to the courts by way of judicial review. [Reference was also made to *Gunton v. Richmond-upon-Thames London Borough Council* [1981] Ch. 448; *Reg. v. British Broadcasting Corporation, Ex parte Lavelle* [1983] 1 W.L.R. 23 and *Halsbury's Laws of England* 4th ed., vol. 5 (1974), p. 514, para. 884.]

Their Lordships took time for consideration.

26 February. Lord Bridge of Harwich. My Lords, for the reasons given in the speeches of my noble and learned friends, Lord Griffiths and Lord Ackner, with both of which I agree, I would allow this appeal.

Lord Brandon of Oakbrook. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Griffiths and Lord Ackner. I agree with them, and for the reasons which they give I would allow the appeal.

Lord Griffiths. My Lords, in March 1973 Miss Thomas accepted the offer of an appointment as lecturer in sociology at Bradford University. She took up her appointment in October 1973. After a probationary period, she became a permanent member of the academic staff. In February 1983 the university dismissed her. Miss Thomas disputes the validity of the dismissal and the issue before your Lordships is whether that dispute falls within the jurisdiction of the High Court or that of the university visitor.

It is common ground that as from 1 October 1973, Miss Thomas became (i) a member of the academic staff of the university, (ii) an employee of the university under a contract of service, (iii) the holder of office in and a member of the university within the meaning of the charter and statutes. It is also common ground that the contract of service included the following terms, namely, (a) that the employment of Miss Thomas and her status as a member of the university were co-terminous; (b) that Miss Thomas would be subject to the burden and entitled to the benefit of the disciplinary rules and procedures established and set out in the charter, statutes, ordinances and regulations such as related to permanent members of the academic staff; (c) that Miss Thomas should not be dismissed from her employment without the due fulfilment of all the procedures governing removal from office.

A member of the permanent academic staff of the university, such as Miss Thomas, has security of tenure until retirement age unless removed

from office by the council of the university for "good cause": see statute 30(2) and ordinance 12.0(4)(*a*). "Good cause" is defined by statute 30(4) in the following terms:

> "'Good cause' when used in reference to removal from office, membership or place means: (A) Conviction of any offence which the court or the council (as the case may be) considers to be such as to render the person concerned unfit for the execution of the duties of his office. (B) Any physical or mental incapacity which the court or the council (as the case may be) considers to be such as to render the person concerned unfit for the execution of the duties of his office. (C) Conduct which the court or the council (as the case may be) considers to be such as to constitute failure or inability of the person concerned to perform the duties of his office or to comply with the conditions of tenure of his office."

The charter, statutes, ordinances and regulations of the university provide an elaborate code of procedures that are to be followed before the council arrive at a decision to remove a member of the academic staff from office and thus terminate their employment by the university. The object of the procedure is to ensure that any complaint is carefully investigated and that the member of staff has a full and fair opportunity to answer the complaint.

Miss Thomas alleges that the university failed to follow the correct procedure in the investigation of the complaint against her and that accordingly the decision of the council to dismiss her was ultra vires, null and void. She alleges that the university should have investigated the complaint against her through the procedure provided under ordinance 13 and regulation 23. The university admit that they did not so proceed but say that they followed the correct procedure which is that prescribed by statute 30. It is unnecessary to consider this dispute in any further detail as it is not for your Lordships to adjudicate upon it. I would observe, however, that as at present advised, I do not agree with the view expressed by Whitford J. and Sir George Waller that it presents no difficulty of construction. I think it may be a matter of considerable difficulty to determine which was the appropriate procedure in the present case.

Against this background Miss Thomas determined to challenge her dismissal, and chose to do so by issuing a writ in the Chancery Division of the High Court on 18 September 1984, some 18 months after the date of her dismissal. By her statement of claim of the same date, she claimed a declaration that the decision taken by the council to dismiss her was ultra vires, null and void; a declaration that the dismissal from her employment was ultra vires, null and void and damages or alternatively arrears of salary from 12 February 1983 until judgment together with interest on damages and loss of salary. The grounds of her claim were confined to allegations that in breach of the terms of her contract of service the university had failed to follow the procedures prescribed by ordinance 13 and regulation 23 and further that irregularities in the procedure in fact adopted amounted to breaches of natural justice. The statement of claim did not raise the issue as to

whether or not there was "good cause" for dismissing Miss Thomas, and your Lordships remain in ignorance of the underlying reasons for Miss Thomas's dismissal.

The university took the view that this dispute, which is confined to the proper interpretation and execution of their internal disciplinary procedures as provided in their charter, statutes, ordinance and regulations, fell within the exclusive jurisdiction of the university visitor and not with the courts of law. Accordingly, by notice of motion dated 12 November 1984, the university applied for an order to stay the proceedings until Miss Thomas should have petitioned the visitor of the university and he had adjudicated upon the issues raised in her statement of claim.

It is now conceded by the university that this was not the appropriate form of relief that they should have sought and that it may to some extent have misled Whitford J. in his approach to the case. The university's submission to Whitford J. included a concession that after the visitor had determined the questions concerning the construction and application of the internal rules, Miss Thomas could then bring an action for damages in the courts and the court would not be bound by the visitor's determination. As Hoffmann J. said in *Hines v. Birkbeck College* [1986] Ch. 524, 543:

> "In those circumstances it is not surprising that Whitford J. thought that the plaintiff might as well start her action in the courts in the first place. No such concession was made before me and in my judgment it was wrong."

The university should have taken out a summons to strike out the statement of claim on the ground that the court had no jurisdiction in respect of the subject matter of the claim, as was done in *Hines v. Birkbeck College*. Your Lordships, at the request of the university and without objection by Miss Thomas, allowed an amendment to the relief sought by the university and the appeal has been argued on the basis that the relief sought is an order to strike out the statement of claim.

Whitford J. [1986] Ch. 381, 394–395, dismissed the application of the university and said in the final paragraph of his judgment:

> "I have referred to the suggestion that in the first instance the matter ought to go before the visitor for consideration of questions arising under paragraphs 1 to 10 and then come back to the court. I cannot imagine a procedure more inconvenient or more likely to involve a wholly unnecessary waste of time and money than this. This is an allegation of a simple breach of contract. By writing the rules into the contract the question at issue has been brought within the jurisdiction of the court, and the application for a stay pending a reference to the visitor must, in my judgment, accordingly fail."

The Court of Appeal [1986] Ch. 381 dismissed the appeal of the university. Although the reasons they gave for their decision were different each member of the court held that the dispute fell within the jurisdiction of the courts and not the visitor. The underlying reason common to each judgment was that as the issue in the case concerned a

breach of a contract the courts retained jurisdiction to adjudicate upon it. There is, however, a marked difference of approach to the solution of the problem.

Fox L.J. accepted that the visitor's jurisdiction was exclusive but, as I understand his judgment, would confine it to such matters as the court chose to concede to the visitor in which he included the admission and amotion (the removal from office) of members, the resolution of academic standards of a university teacher or student, and other matters that in practical terms he considered unsuitable to the jurisdiction of the courts and in which he included the marking of examination papers; the awarding of prizes and the choice of fellows. It is obvious that disputes raising such issues can be formulated as breaches of contract or torts and Fox L.J. acknowledged that this could not be the criterion upon which such claims should be judged to fall within or without the visitor's jurisdiction. However, he considered that the present case, which alleged a contractual failure to follow the university's internal procedures, should be adjudicated upon by the court as a part of the general law of contract. Fox L.J.'s view is summed up in the following passage from his judgment, at p. 407:

> "[The visitor's] jurisdiction derives from the status of membership, and where the issue, as in a case of breach of contract, does not derive from status, it seems to me that he has no jurisdiction except that which the court may concede to him."

Lloyd L.J. adopted the approach of the Court of Appeal in New Zealand in *Norrie v. University of Auckland Senate* [1984] 1 N.Z.L.R. 129, and held that the jurisdiction of the courts and the visitor were no longer mutually exclusive and that the jurisdiction of the visitor was now subordinate to that of the courts. Applying that approach, he held that the issue in this case did not have the "necessary domesticity" to be left to the jurisdiction of the visitor, and that as the claim was one for wrongful dismissal it remained within the jurisdiction of the courts.

Sir George Waller, although accepting the exclusivity of the jurisdiction, emphasised what he described as the truly domestic situations in which in modern cases the visitor had been held to have exclusive jurisdiction. He distinguished two cases in which the dismissal of, in one case, a schoolmaster and the other, a chorister, were held to fall within the jurisdiction of the visitor on the grounds that they were dealt with simply as a matter of status and no question of contract arose: see *Whiston v. Dean and Chapter of Rochester* (1849) 7 Hare 532 and *Reg. v. Dean and Chapter of Chester* (1850) 15 Q.B. 513. He summarised his reasons in the final paragraph of his judgment [1986] Ch. 381, 422:

> "In this case there is a clear allegation of breach of contract. It is true that the breach of contract which is alleged is a failure to comply with the provisions of the statutes of the university, but in my judgment the provisions are clear, and whether there was a breach or not is a simple question of fact. It is not something peculiar to the visitor. To say that this case has to be retained in the visitatorial jurisdiction is to deprive the plaintiff of her rights at law. In my opinion, therefore, this is something which can properly be

A dealt with by the ordinary courts of law. It is not necessary to refer the interpretation of rules to the visitor."

I have already expressed my dissent from the view that no question of the interpretation of the statutes arises and I am not clear what would have been the view of Sir George Waller if he had considered that the present dispute depended, at least in part, upon the interpretation of the B university statutes and ordinances.

Clause 29 of the Charter of the University provides for the appointment of a visitor by the Crown on the petition of the Court of the University. No petition has been received and no visitor appointed under this power. However it is common ground that in the absence of such an appointment the Crown as founder of the university is the visitor of the university and that the visitatorial powers will be exercised C by the Lord Chancellor (or such other person as he may advise Her Majesty to nominate), on behalf of the Crown: see *Attorney-General v. Dedham School* (1857) 23 Beav. 350 and the judgment of Sir Robert Megarry V.-C. in *Patel v. University of Bradford Senate* [1978] 1 W.L.R. 1488.

It has been conceded by Miss Thomas that the jurisdiction of the D visitor is an exclusive jurisdiction, and the argument before your Lordships has been principally devoted to exploring the limits of the jurisdiction. However, as Lloyd L.J. has questioned the exclusivity of the jurisdiction, it is right to consider whether the concession was properly made.

My Lords, in my opinion the exclusivity of the jurisdiction of the visitor is in English law beyond doubt and established by an unbroken E line of authority spanning the last three centuries from *Philips v. Bury* (1694) Skin. 447 to *Hines v. Birkbeck College* [1986] Ch. 524. This aspect of the jurisdiction has been examined and expounded with clarity and learning in articles by Dr. J. W. Bridge, "Keeping Peace in the Universities: the Role of the Visitor" (1970) 86 L.Q.R. 531, and Dr. Peter Smith, "The Exclusive Jurisdiction of the University Visitor" F (1981) 97 L.Q.R. 610; "Visitation of the Universities: A Ghost from the Past" (1986) 136 New Law Journal 484, 519, 567, and with their assistance, for which I am indebted, I select judicial statements which have over the years reiterated the principle that the courts of law will not trespass upon matters that lie within the jurisdiction of the visitor.

To start with in *Philips v. Bury*, Skin. 447, Holt C.J. said, at p. 485, in his dissenting judgment, subsequently upheld by the House of Lords, G speaking of the jurisdiction of the visitor:

> "It is not . . . material, whether he hath a court or no; all the matter is, whether he hath a jurisdiction; if he hath jurisdiction, and conusance of the matter and the person, and he gives a sentence in the matter, his sentence must have some effect to make a vacancy, be it never so wrong; but there is no appeal, if the founder hath not H thought fit to direct an appeal; that an appeal lieth in the Common Law Courts of the Kingdom, is certainly not so: . . ."

In the next century it is sufficient to cite two cases, one in the Chancery Court and one in the King's Bench in which the court declined

jurisdiction on the ground that the dispute fell within the jurisdiction of the visitor. In *Attorney-General v. Talbot* (1747) 3 Atk. 662; 1 Ves. Sen. 78 an unsuccessful candidate for a fellowship applied to the Chancery Court for a declaration that within the terms of the fellowship he should have been preferred to the fellow elected. Lord Hardwicke L.C. refused to entertain the application on the grounds that such a dispute fell within the jurisdiction of the visitor. In *St. John's College, Cambridge v. Todington* (1757) 1 Burr. 158 the unsuccessful candidate on this occasion appealed to the visitor and it was the college authorities that tried to prevent him doing so by seeking a prohibition in the King's Bench. They failed because the court held that the dispute fell within the jurisdiction of the visitor. In the course of his judgment Lord Mansfield C.J. said, at p. 200:

> "The visitorial power, if properly exercised, without expence or delay, is useful and convenient to colleges. However, (be that as it may,) we must take it, as it is now established by law: and it is now settled and established, (since the case of *Philips v. Bury* in Dom.Proc.) 'that the jurisdiction of the visitor is summary and without appeal from it.'"

In *Reg. v. Dean and Chapter of Chester*, 15 Q.B. 513 a chorister who had been removed from his office by the dean and chapter of the cathedral applied for mandamus to restore him to his office. The application was refused the court holding that mandamus did not lie, as the remedy for the wrongful amotion complained of was by application to the visitor who had sufficient and exclusive jurisdiction. Lord Campbell C.J. said, at pp. 520–521:

> "Lastly it was contended before us that, although Mr. Humphreys might have appealed to the visitor, he was not bound to do so, and that he may still call for the interference of this court: but this notion of a concurrent jurisdiction is expressly contradicted by the language of Lord Hale in [*Appelford's Case* (1672) 1 Mod. 82] and by the whole current of decisions on the subject."

In *Reg. v. Hertford College, Oxford* (1878) 3 Q.B.D. 693, one, Tillyard, complained that the college had refused to examine him for a lay fellowship and wrongly elected another person to the fellowship after examination. He obtained a mandamus in the Queen's Bench Division directed to the principal, fellows and scholars of Hertford College, Oxford, commanding them to examine Tillyard as a candidate for a vacant fellowship in the college and to proceed to the election of a fellow pursuant to the statutes of the college. The Court of Appeal reversed the judgment of the Queen's Bench Division and set aside their order. The Court of Appeal held that there was in fact no refusal to examine Tillyard but even if there had been such a refusal the remedy was not by way of mandamus but by appeal to the visitor. Lord Coleridge C.J. said, at p. 706:

> "For these reasons, then, upon the facts of this particular case, we think there is no ground for issuing the mandamus. The prosecutor was not refused examination, he did not place himself in a condition

to claim more of the college than the college had offered; if he had and if they had improperly refused him his wrong would be one corrigible by the visitor and not by the courts of law; . . ."

In *Thomson v. University of London* (1864) 33 L.J. Ch. 625, 634, a case to which I shall have to return later, Kindersley V.-C. spoke of the case falling within "the exclusive cognizance, of the visitor."

In the course of his review of the modern authorities in *Patel v. University of Bradford Senate* [1978] 1 W.L.R. 1488, Sir Robert Megarry V.-C. said, at pp. 1493–1494:

> "In *Rex v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127, a King's Bench Divisional Court refused to grant an order of mandamus directing the Chairman of Convocation of London University to summon an extraordinary meeting of convocation in accordance with one of the university statutes, on the ground that the proper remedy was to apply to the visitor. 'The court,' said Lord Goddard C.J. at p. 132, 'will not interfere in the matter within the province of the visitor; . . . ' Perhaps the strongest authority is *Thorne v. University of London* [1966] 2 Q.B. 237. There, an unsuccessful candidate for the London Ll.B. sued the University of London for damages for negligently misjudging his examination papers, and for an order of mandamus requiring the university to award him the grade that his papers justified. The Court of Appeal refused leave to appeal from a decision which had struck out the writ and statement of claim and dismissed the action. In the words of Diplock L.J. at p. 242: 'actions of this kind relating to domestic disputes between members of the University of London (as is the case with other universities) are matters which are to be dealt with by the visitor, and the court has no jurisdiction to deal with them.' This case makes it plain that the question is not merely one of refusing discretionary remedies or requiring alternative forms of relief to be pursued first, but is truly a matter of jurisdiction. Two interlocutory observations by Diplock L.J. on p. 240 emphasise that the visitor has the sole and exclusive jurisdiction, and that at common law the court has no jurisdiction to deal with the internal affairs or government of the university, because these have been confided by the law to the exclusive province of the visitor."

The Vice-Chancellor expressed his conclusion in the following words, at p. 1493E "On the authorities it seems to be clear that the visitor has a sole and exclusive jurisdiction, and that the courts have no jurisdiction over matters within the visitor's jurisdiction." This statement of the law has since been accepted by Kelly L.J. in *In re Wislang's Application* [1984] N.I. 63 and by Hoffmann J. in *Hines v. Birkbeck College* [1986] Ch. 524.

In *Herring v. Templeman* [1973] 2 All E.R. 581 a student teacher who had been requested to withdraw from a teacher training college on academic grounds commenced an action against the governors for a declaration that the resolution of the governing body dismissing him was ultra vires null and void; he alleged breach of the internal regulations of the college and a breach of natural justice. The case is of interest

because the plaintiff conceded that his matters of complaint fell within the jurisdiction of the visitor but submitted that in so far as the allegations were of a breach of natural justice the court retained a concurrent jurisdiction. Brightman J. rejected this submission and struck out the statement of claim. He said, at p. 591:

> "In the action with which I am concerned, the plaintiff's case is that he did not have a hearing before the academic board, that he did not have a fair hearing before the governing body and that the procedure of his dismissal was defective. In my judgment, these are essentially matters which touch the internal affairs or government of the college and are therefore matters confined by law to the exclusive province of the visitor."

It should be noted that during the hearing of this case in the Court of Appeal it emerged for the first time that the plaintiff was not a member of the college which had been the basis of his case at first instance. The Court of Appeal allowed the plaintiff to amend his statement of claim and affirmed the judgment of Brightman J. on other grounds which are not material to the present appeal: see *Herring v. Templeman* [1973] 3 All E.R. 569.

In New Zealand, the Court of Appeal has taken a different view of the visitor's jurisdiction as it applies to their universities. In *Norrie v. University of Auckland Senate* [1984] 1 N.Z.L.R. 129, Woodhouse P. and Cooke J. whilst acknowledging that the English authorities showed that in England the visitor had an exclusive jurisdiction, nevertheless held that in New Zealand it should be considered as subordinate to the courts. In that case the courts in fact refused judicial review to a medical student who had been refused enrolment in the Faculty of Medicine after failing his final examination in the previous year. The court held that such an issue should be dealt with by the visitor. There may be much to be said for this approach in which the scope of the visitor's jurisdiction will be developed in New Zealand on a case by case basis although uncertainty as to the extent of the jurisdiction will reign until a sufficient body of precedent has built up to indicate what issues the court will consider should be left to the visitor. However, this is not the way in which our law has developed and in my view it is not open to your Lordships to follow Lloyd L.J. and adopt the New Zealand solution. I agree with Hoffmann J. when he said in *Hines v. Birkbeck College* [1986] Ch. 524, 539:

> "It is conceded that the jurisdiction of the visitor and the courts are mutually exclusive. The courts in New Zealand have felt able to take a different view (see *Norrie's* case [1984] 1 N.Z.L.R. 129) but in this country this matter is concluded by a line of decisions commencing with that of the House of Lords in *Philips v. Bury* (1694) Skin. 447."

I turn now to consider the scope of the visitatorial jurisdiction. The jurisdiction stems from the power recognised by the common law in the founder of an eleemosynary corporation to provide the laws under which the object of his charity was to be governed and to be sole judge

of the interpretation and application of those laws either by himself or by such person as he should appoint as a visitor. In *Philips v. Bury*, Skin. 447, Holt C.J. described it thus, 1 Ld.Raym. 5, 8:

> "the office of visitor by the common law is to judge according to the statutes of the college, to expel and deprive upon just occasions, and to hear appeals of course. And from him, and him only, the party grieved ought to have redress; and in him the founder hath so reposed entire confidence that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever."

In *Ex parte Kirkby Ravensworth Hospital* (1808) 15 Ves. 305, 311, Sir Samuel Romilly said in a passage in his argument which has long been accepted as authoritative:

> "A visitor is . . . a judge, not for the single purpose of interpreting laws, but also for the application of laws, that are perfectly clear: requiring no interpretation; and, farther, for the interpretations of questions of fact; involving no interpretation of laws."

As the jurisdiction stems from the power to provide and administer the domestic law of the foundation, it can as a general rule be said only to apply to those who are members of the foundation because only they are subject to those domestic laws. Nevertheless the jurisdiction has always been held to apply both to admission to and removal from office in the foundation and many of the old cases concern the election or amotion of fellows at Oxford and Cambridge colleges. I am not sure whether these cases concerning fellowships touched directly upon the principal means of livelihood of those concerned although I suspect they did. There are however other cases in which the visitatorial jurisdiction undoubtedly governed the question of employment in the sense of earning a living which one would suppose loomed larger for those affected, than the status involved in the employment. Thus in *Attorney-General v. Magdalen College, Oxford* (1847) 10 Beav. 402, the appointment of a master and usher to the college school were held to fall within the jurisdiction of the visitor even though they were not corporators and in *Whiston v. Dean and Chapter of Rochester*, 7 Hare 532, the dismissal of the headmaster from the cathedral grammar school was also held to fall within the exclusive jurisdiction of the visitor. In *Rex v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127, 132, Lord Goddard C.J. said:

> "Any question that arises of a domestic nature is essentially one for a domestic forum, and this is supported by all the authorities concerning visitatorial powers and duties. The question has generally arisen with regard to the election of fellowships; but I see no difference in principle between the question whether a particular person ought to be elected to a fellowship and the question whether a particular person is a fit and proper person to be appointed or retained as a teacher at a university or school."

The explanation for the visitor's jurisdiction extending in cases of admission and removal from office (amotion) to those who are not

corporators lies in the basis of his jurisdiction, namely, as the judge of the internal or domestic laws of the foundation. It is because those laws invariably provide for the conditions governing admission to and removal from membership of the foundation and sometimes of offices on the foundation short of membership that jurisdiction in such matters lies with the visitor.

It is a mistake to consider that the visitor's jurisdiction derives from the status of membership, as Fox L.J. said in the course of judgment in the Court of Appeal. That is, with respect, putting the cart before the horse. The jurisdiction derives from the visitor's position as a judge of the internal laws of the foundation, and he has jurisdiction over questions of status because it is upon those laws that status depends.

A similar issue to that which arises in this appeal was considered by Kelly L.J. in *In re Wislang's Application* [1984] N.I. 63. The facts are sufficiently set out in the headnote:

> "In 1981 the applicant was appointed by the Senate of the Queen's University of Belfast to a lectureship (medical) in anatomy, subject to a period of probation until 30 September 1983. His conditions of appointment provided for an annual assessment of his 'teaching, research and scholarly ability' by an ad hoc group consisting of his head of department and senior colleagues. The ad hoc group made, in September 1982, an adverse assessment of the applicant's progress and, in February 1983, reported that it was unable to recommend to the Board of Curators that he be confirmed in post. The Board of Curators invited the applicant to attend for interview but he failed to do so. In his absence the board decided that it could not recommend to the senate that he be confirmed in post and informed him of their decision. In April 1983 the applicant exercised his right of appeal to a committee appointed by the Senate. The appeal committee, after considering the oral and written submissions of the applicant, dismissed the appeal and so reported to the Senate which in May 1983 resolved to terminate the applicant's employment with effect from 27 May 1983, informing him that his salary up to the end of the academic year (30 September 1983) would be paid to him in a lump sum.
>
> "The applicant appealed to the visitor and in July 1983 a board of visitors was appointed, taking up office on 1 October 1983. In November the board informed the applicant that it proposed to consider the appeal on the documents submitted to it. The applicant sought an oral hearing and also legal representation but in January 1984 this was refused. The applicant then sought, and, on appeal, was granted leave to apply for judicial review. It was contended for the university that the matters in dispute were within the exclusive jurisdiction of the board of visitors. The applicant contended that the board had no jurisdiction because (a) the board had not been in existence at the time of the appeal and had subsequently delayed unduly, (b) that the board, containing a member of the Convocation of the university and a former secretary of the university, was improperly constituted and had acted unfairly by refusing an oral hearing and legal representation; (c) the issues in dispute involved

questions of contract and the legality of the proceedings of several bodies of the university, and (d) the board could not grant effective remedies."

Kelly L.J. in an impressive judgment containing a comprehensive review of the authorities held that the matters in dispute were exclusively within the visitatorial jurisdiction. Dealing with the argument that the issues in dispute involved questions of contract and were thus outside the jurisdiction of the visitor, he said, at pp. 80-81:

> "That the matters in dispute were internal matters lying within the visitatorial jurisdiction was of course strongly challenged by Dr. Wislang. They were not, he said, because they included the question of the validity of the decision to dismiss him, the authority of the Vice-Chancellor and the Secretary of the University, the legality and regularity of the proceedings before the Board of Curators and the Appeal Committee and the Senate. All these were matters he submitted outside the jurisdiction of the board of visitors, because they were, or many of them were in breach of his contract of employment.
>
> "But what the authorities show, as I read them, is that matters may well be in breach of a contract of employment, yet within visitatorial jurisdiction, if those matters are of an internal domestic character or touch upon the interpretation or execution of private rules and regulations of the university. Of course the applicant has the right under his contract to have the criteria relating to the assessment of his fitness as a lecturer observed and the special procedures of the university bodies who determine this and as a result terminate his employment, regularly and fairly followed. But this right while a right under a contract of employment seems to me to relate to the regular and fair execution of procedures in accordance with the internal rules and regulations at the university. If the matters in dispute under his contract of employment related to purely common law or statutory rights and not to private or special rights of the university, then of course visitatorial jurisdiction could not determine them and Dr. Wislang's remedies would be in the ordinary courts or the appropriate statutory tribunals. This must follow from the nature of visitatorial jurisdiction itself as analysed and explained by the case-law, as well as the relationship between the university and a lecturer and who by his contract of employment becomes a member of the university and submits himself to its internal rules on matters touching his standing and progress at the university.
>
> "Undoubtedly a contract of employment may contain terms some of which are concerned with private or special rights given as a member of the university and other terms express or implied which give purely contractual or statutory rights. In these circumstances the visitatorial and the common law or industrial jurisdictions co-exist. The common law or statutory rights are enforceable in the courts or the appropriate statutory tribunals, but the visitatorial jurisdiction is not ousted."

In *Hines v. Birkbeck College* [1986] Ch. 524, Hoffmann J. in an equally impressive judgment considered the same issue. Again, I take the facts from the headnote:

> "In 1971 the Senate of the University of London, with the consent of the governing body of Birkbeck College, appointed the plaintiff to a chair of economics at the college and conferred upon him the title of 'Professor,' with the status of 'appointed teacher.' His salary was paid by the college, which had the power to dismiss him. The university senate had power to deprive him of his title and status. He was ex officio a member of the academic board of the college. His duties included conducting such classes, and giving such lectures and other teaching as might be necessary, and also research work. In the academic year 1980/81 he was given paid leave by the college in order to engage upon a research project. In 1981/82 he was given unpaid leave so that he could continue work on his project. At the beginning of the academic year 1982/83 he sought a further extension of his leave in order to complete his project, but that was refused and certain teaching duties were assigned to him, which, however, he refused to perform. On 16 February 1983, the master of the college initiated procedures which led first to suspension and finally, on 7 July 1983, to dismissal for alleged serious misconduct. On 29 July 1983 the master of the college wrote to the principal of the university reporting that the plaintiff had been dismissed, enclosing a copy of the report of the consultative group, composed of members of the academic staff and officers of the college, which had found the plaintiff guilty of gross misconduct, and inviting the senate of the university to take steps to deprive him of his title and his status as an appointed teacher. A report of the university committee, which was set up to consider the matter, recommended that the plaintiff be deprived of his title. On 17 May 1985 the plaintiff, shortly before the committee's report was to be considered by the senate of the university, issued a writ claiming, as against the college, that its purported decision to dismiss him forthwith if he did not resign within seven days, and its purported dismissal of him pursuant thereto, were ultra vires, null and void, and an injunction to restrain the university from depriving him of his title of professor and status as an appointed teacher."

The university and the college moved to strike out the plaintiff's claims on the grounds, inter alia, that the High Court lacked jurisdiction to deal with the matters involved.

The argument for the plaintiff was the same as that which was accepted by the Court of Appeal in the present case and is summarised at p. 541:

> "Mr. Sedley says with equal truth that he does not seek to enforce the customs, procedures or statutes of the college as such. He relies upon them only to the extent that they may be taken to have been incorporated as terms of the plaintiff's contract of employment. If that contract was, in accordance with his primary submission, made with the university, he says that the college by excluding the

plaintiff and depriving him of his salary has committed the tort of wrongful interference with contract. If the contract was with the college then it has been broken. In either case he founds his claim upon the general law of contract or tort, neither of which are within the jurisdiction of the visitor."

Dealing with the argument Hoffmann J. said, at pp. 542–543:

"Mr. Sedley has argued that the test of whether the dispute is domestic should be whether it is conveniently justiciable in the courts. The marking of examination papers, as in *Thomson's* case, 33 L.J. Ch. 625 and *Thorne's* case [1966] 2 Q.B. 237 or as in *Patel's* case [1978] 1 W.L.R. 1066, the question of whether Mr. Patel was sufficiently qualified to enter for a degree in mathematics were obviously matters in which the courts declined jurisdiction with relief. But the courts have no difficulty in deciding whether principles of natural justice have been observed or rules of procedure incorporated into contracts of employment correctly applied. If one were seeking to devise a new system from scratch, it might well be thought fair to allow the courts full concurrent jurisdiction in all claims based on causes of action at common law or in equity, subject to a discretionary power to stay proceedings on the ground that some or all of the matters in issue are more suitable for adjudication by the university's internal tribunals. Something along these lines seems to have been canvassed by the New Zealand Court of Appeal in the *Norrie* case [1984] 1 N.Z.L.R. 129. This might avoid anomalies such as occurred in the *Casson* case [1983] 1 All E.R. 88 in which the petitioner's claim in the county court was struck out because the matter was said to be one for the visitor and the visitor declined jurisdiction because the claim was one for the courts. It would also avoid problems in obtaining interlocutory relief, about which there are obvious administrative difficulties when the visitor is the Privy Council. It is, however, far too late for this court to adopt such a scheme. For one thing, it is settled law that the jurisdictions are mutually exclusive. The authorities also make it clear that, irrespective of whether courts would be as well or better qualified to deal with the particular case, a dispute has the necessary domesticity if it involves members of the corporation and the interpretation or application of its internal rules, customs or procedures. Further, as Sir Samuel Romilly said in argument in *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305, 311, (a passage quoted in Dr. Smith's article, 97 L.Q.R. 610, 614): 'A visitor is . . . a judge, not for the single purpose of interpreting laws, but also for the application of laws, that are perfectly clear, requiring no interpretation, and, further, for the interpretations of questions of fact . . . '"

In both these cases it was held that the dispute lay within the visitatorial jurisdiction and, in my view, both these cases were rightly decided.

The Court of Appeal, laying emphasis upon the "domestic" nature of the visitatorial jurisdiction, did not follow these decisions. Lloyd L.J.

relied particularly upon a quotation from the judgment of Kindersley V.-C. in *Thomson v. University of London*, 33 L.J. Ch. 625. The facts of that case were far different from the present; it concerned a dispute over the award of a gold medal in the examination for the LL.D. degree which, not surprisingly, was held to fall within the visitatorial jurisdiction. However, it appears to be the first of the cases in which the question of contract was argued. In the course of his judgment the Vice-Chancellor said, at p. 634:

> "the line of demarcation between that class of questions which comes under the jurisdiction of the visitor on the one hand, and that class of cases which comes under the jurisdiction of this court, as a court of equity, on the other, is this,—whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the visitor, and only under the jurisdiction of the visitor, and this court will not interfere in those matters; but when it comes to a question of right of property, or rights as between the university and a third person dehors the university, or with regard, it may be, to any breach of trust committed by the corporation, that is, the university, and so on, or any contracts by the corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed, this court will interfere."

Lloyd L.J. [1986] Ch. 381, 410F, in commenting upon this passage, said: "I am tempted to say that the present case does not relate to the 'mere management and arrangement and details' of the University of Bradford, and leave it at that." The Vice-Chancellor's judgment is clearly extempore and I would hesitate to place too much reliance upon any particular phraseology used in the course of this discursive judgment. What is however of importance is that the Vice-Chancellor did not treat the allegation of a cause of action in contract as necessarily ousting the jurisdiction of the visitor.

This then leads me to consider what is meant by the reference in the cases to the "domesticity" of the visitatorial jurisdiction. The word is clearly not used with the width of its everyday meaning. Nothing could be more domestic in its everyday sense than the arrangements in the kitchens or for the cleaning of the premises, but no one suggests that the domestic staff of a university fall within the visitatorial jurisdiction. I am satisfied that in referring to the domestic jurisdiction the judges are using a shortened form of reference to those matters which are governed by the internal laws of the foundation. This will include not only the interpretation and enforcement of the laws themselves but those internal powers and discretions that derive from the internal laws such as the discretion necessarily bestowed upon those in authority in the exercise of their disciplinary functions over members of the foundation. It is only if "domesticity" is understood in this sense that any principle emerges that can be of general application to determine whether or not a given matter falls within the visitatorial jurisdiction. What is not permissible is to regard "domesticity" as an elastic term giving the courts freedom to

choose which disputes it will entertain and which it will send to the visitor. This approach necessarily involves the concept of a concurrent jurisdiction, and as I have endeavoured to show this is not the way in which our law has developed.

I would adopt the following passage from Dr. Smith's latest article "Visitation of the Universities: A Ghost from the Past—III" (1986) 136 New Law Journal 567–568:

> "Once it is recognised that the supervision of the statutes, ordinances, regulations etc. of the foundation is the basis of the visitatorial jurisdiction, then it becomes a relatively simple matter to define the scope of the visitor's powers, for any matter concerning the application or the interpretation of those internal laws is within his jurisdiction, but questions concerning rights and duties derived otherwise than from such internal laws are beyond his authority. Thus a matter or dispute is 'domestic' so as to be within the visitatorial jurisdiction if it involves questions relating to the internal laws of the foundation of which he is visitor or rights and duties derived from such internal laws. Conversely, an issue which turns on the enforcement of or adjudication on terms entered into between an individual and his employer, notwithstanding that they may also be in the relationship of member and corporation, and which involves no enforcement of or adjudication concerning the domestic laws of the foundation, is ultra vires the visitor's authority and is cognizable in a court of law or equity (see 97 L.Q.R. 644). . . ."

In the present case, the entire dispute is centred upon the statute ordinances and regulations of the university. Were they correctly applied and were they fairly administered? Such a dispute in my view falls within the jurisdiction of the visitor and not the courts of law, notwithstanding that its resolution will affect Miss Thomas's contract of employment.

It has, however, been urged upon your Lordships that such an approach rooted as it is in mediaeval law has no place in a modern society and will by denying university teachers access to the courts in cases affecting contracts of employment place them at a grave disadvantage to all others who can turn to the courts to resolve such disputes, and particularly in comparison to the majority of their colleagues in the teaching profession. If such shackles ever existed as prevented a court entertaining a claim for breach of a contract of employment, the time has come to strike them off, and to restore so important a matter to the jurisdiction of the courts.

The appeal of such an argument is readily understood. All are jealous of their own territory and in the ordinary course of events nothing falls more naturally within the territory of the courts than disputes between master and servant. It being a well recognised function of the common law to resolve such disputes they must, it is said, fall outside the visitatorial jurisdiction. In support of this argument the appellant relied upon the decision of Lord Hailsham of St. Marylebone L.C., sitting as visitor in *Casson v. University of Aston in*

Birmingham [1983] 1 All E.R. 88. The facts were that the two petitioners had been accepted by the university to read a course in "human communication." The university subsequently found that they were unable to provide the course and offered an alternative course in "human psychology" which was accepted by the petitioners and they were admitted to the university to read that course. They then sued the university in the county court for damages for breach of contract in respect of the course in "human communication." The registrar and the judge declined jurisdiction holding that the dispute fell within the jurisdiction of the visitor. They then petitioned the visitor, but the Lord Chancellor acting as the visitor, also declined jurisdiction. The Lord Chancellor relied upon the first of the articles by Dr. Smith. He said, at pp. 90-91:

> "It is, perhaps, unfortunate that none of the parties to this dispute have referred to the exhaustive and up-to-date article by Dr. Peter M. Smith 'The Exclusive Jurisdiction of the University Visitor' (1981) 97 L.Q.R. 610. If they had, I believe much trouble would have been avoided."

In giving his principal reason for declining jurisdiction, the Lord Chancellor said, at p. 91:

> "I agree, however, with Dr. Smith that a visitor can have no jurisdiction in any matter governed by the common law, e.g. contract (see 97 L.Q.R. 610, 615). I regard each of the petitions as claims for damages for breach of a contract entered into *before* the petitioners became members of the university and for nothing else" (my italics).

As the contract relied upon was one between the university and third parties who were not members of the university at the time it was entered into, I accept this case as correctly decided. However, the head-note puts the decision on a far wider basis and reads:

> "*Held*—The petitions would be dismissed for the following reasons—(1) A visitor of a foundation had no jurisdiction in any matter governed by the common law, and, once a relationship with the foundation had been established which was governed by the general laws of the realm over which the visitor could have no jurisdiction, the visitor was wholly excluded from considering any question concerning that relationship. Since the relationship of contract was governed by the general laws of the realm, the visitor had no jurisdiction over contracts entered into with the foundation, and the fact that the other contracting party was also a member of the foundation did not have the effect of excluding the jurisdiction of the courts and putting the matter exclusively within the visitor's authority."

If, which I doubt, the Lord Chancellor did intend to put the decision upon so broad a base as excluding any relationship which, apart from visitatorial jurisdiction, would otherwise be governed by the common law, I must respectfully disagree with him. I have already pointed out

that almost any dispute between a member and the university can be framed in either contract or tort, which relationships are apart from the visitatorial jurisdiction governed by the common law. To adopt this approach would entirely emasculate the visitatorial jurisdiction leaving it with virtually no content. Dr. Smith in his recent articles in the "New Law Journal," to which I have already referred, has made it plain that he was not to be understood as suggesting in his article in the "Law Quarterly Review" any such sweeping approach to the visitatorial jurisdiction. It may be apposite at this point to say a word about trusts as they are referred to in the passage cited by the Lord Chancellor from Dr. Smith's article as being analogous to contracts. The reason why the courts have maintained their jurisdiction over trusts, whether or not they benefit members of the foundation, is that the terms of the trust are to be derived from the construction of the trust instrument and not by any application of the laws of the foundation. Thus the construction of a trust must be a matter for the courts and not the visitor, nor is there any reason why the supervision of the trust should not remain with the courts. The cases on trusts well illustrate the principle that only those matters governed by the laws of the foundation are within visitatorial jurisdiction: see *Green v. Rutherforth* (1750) 1 Ves.Sen. 462, and *Ex parte Berkhamsted Free School* (1813) 2 Ves. & Bea. 134, and *Attorney-General v. Magdalen College, Oxford*, 10 Beav. 402. Other cases are to be found discussed by Dr. Smith in 97 L.Q.R. 610, 634–637.

Miss Thomas relied also upon the view expressed by the Lord Chancellor that a university visitor has no power to award damages. He said [1983] 1 All E.R. 88, 91:

> "After considerable research, I have been unable to find any precedent in the long history of visitatorial powers in which a visitor has made such an order and in my view he has no such power."

This view is to be contrasted with that expressed by Burt C.J. in *Murdoch University v. Bloom and Kyle* [1980] W.A.R. 193, 198, in which he said on the assumption that a breach of contract fell within visitatorial jurisdiction:

> "If it were then I can see no reason why an action for damages if brought upon the breach of such a contract would not equally be a matter within the exclusive jurisdiction of the visitor. . . ."

I prefer the view expressed by Burt C.J. I can see no reason why the visitor as judge of the laws of the foundation should not have the power to right a wrong done to a member or office holder in the foundation by the misapplication of those laws. The visitor would be a poor sort of judge if he did not possess such powers. Suppose, first, a case in which on appeal the visitor concluded that there had been no "good cause" for the dismissal of a member of the academic staff and ordered the reinstatement of the member: I cannot entertain a doubt that the visitor would have power to order payment of arrears of salary between the date of dismissal and reinstatement. Suppose, secondly, a case in which the visitor concluded there had been no "good cause" for the dismissal but relations between the dismissed member and the other members of

the academic staff had so deteriorated that it would be inimical to the general health of the university to order reinstatement. Why in these circumstances should the visitor not proceed to right the wrong done to the member by ordering that a monetary recompense should be paid by the university in lieu of reinstatement. No doubt in calculating the sum he would be guided by those principles that the courts have worked out in cases of wrongful dismissal in which the courts refuse to enforce a contract of service wrongfully terminated but give monetary recompense instead, which the law labels as damages. To deny a visitor such a power is to deny him one of the fundamental functions of a judge which is to right a wrong, in so far as money can.

My Lords, I cannot accept that the continuation of the visitatorial jurisdiction with the scope and powers I have discussed will leave the academic staff of universities at a significant or at any disadvantage to their colleagues working in other fields of education. In the first place the action for wrongful dismissal has largely been superseded by the far wider protection afforded to employees by the Employment Protection (Consolidation) Act 1978. All these rights are available to all university academic staff because Parliament can of course invade the jurisdiction of the visitor if it chooses to do so. If in the course of such proceedings any question arises concerning the interpretation or application of the internal laws of the university, it will have to be resolved for the purpose of the case by the tribunal hearing the application. Such power must be implicit in the remedies provided by the Act, and to this extent, Parliament has given rights that enter and supersede the jurisdiction of the visitor. I cannot accept the suggestion that if in the course of a tribunal hearing a question arises concerning the interpretation of university statutes etc., the case should be adjourned pending a decision by the visitor. This would be altogether too unwieldly a procedure and cannot have been the intention of Parliament.

Secondly, if what is really sought is reinstatement, it is more likely to be achieved by appeal to the visitor than to the courts. As a general rule the courts will not enforce a contract of service and the delay that inevitably results between the dismissal and the date upon which the case comes before the court makes reinstatement all the less likely, for by the time the case is heard the plaintiff's post will have already been filled. The appeal to the visitor is, however, a speedy and informal procedure and reinstatement can be considered without the constraints imposed by the passage of time.

It is true that the decision of the visitor is final and the parties are thus deprived of challenging a decision in the Court of Appeal and perhaps the House of Lords. But is this a disadvantage or an advantage? I rather think it is an advantage. Today the visitors of universities either are or include independent persons of the highest judicial eminence. Would not most people consider it better to accept the decision of such a person rather than face the risk of the matter dragging on through the years until the appellate process has finally ground to a halt. There is also the advantage of cheapness, lack of formality and flexibility in the visitorial appeal procedure which is not bound by the intimidating and formalised procedures of the courts of law.

Finally, there is the protection afforded by the supervisory, as opposed to appellate, jurisdiction of the High Court over the visitor.

It has long been held that the writs of mandamus and prohibition will go either to compel the visitor to act if he refused to deal with a matter within his jurisdiction or to prohibit him from dealing with a matter that lies without his jurisdiction. On mandamus see *Rex v. Bishop of Ely* (1794) 5 Durn. & E. 475 and *Rex v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127, and on prohibition, see *Reg. v. Bishop of Chester* (1791) 1 W. Bl. 22, and *Bishop of Chichester v. Harward and Webber* (1787) 1 Durn. & E. 650. Although doubts have been expressed in the past as to the availability of certiorari, I have myself no doubt that in the light of the modern development of administrative law, the High Court would have power, upon an application for judicial review, to quash a decision of the visitor which amounted to an abuse of his powers.

These considerations lead me to the conclusion that the visitatorial jurisdiction subject to which all our modern universities have been founded is not an ancient anachronism which should now be severely curtailed, if not discarded. If confined to its proper limits, namely, the laws of the foundation and matters deriving therefrom, it provides a practical and expeditious means of resolving disputes which it is in the interests of the universities and their members to preserve.

For these reasons, my Lords, I would allow this appeal.

Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Griffiths and Lord Ackner. I agree with them, and for the reasons which they give I would allow the appeal.

Lord Ackner. My Lords, the proposition that the visitor's jurisdiction may be an unwelcome survivor from the past, like a ghost, in Lord Atkin's famous phrase in *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1, 29 "standing in the path of justice clanking his medieval chains" was firmly, and in my judgment correctly, rejected by Lloyd L.J. in his judgment in the Court of Appeal [1986] Ch. 381, 412B dismissing Bradford University's appeal. He accepted that the visitor still had a valuable function to perform in a modern university. Indeed, he said, at p. 415:

> "Within its proper limits the jurisdiction of the visitor is wholly beneficial. So much so that, if a visitor did not exist, it might have been necessary to invent him."

Sir Robert Megarry V.-C. in *Patel v. University of Bradford Senate* [1978] 1 W.L.R. 1488, 1499–1500 posed and answered the following question: "Why, it may be said, should most university students be precluded from access to the courts in many matters of dispute with the university authorities?" He said:

> "I think that there is much that can be said in answer. I shall take three examples. First, there is no question of the students being denied access to a tribunal that can resolve the dispute: the only

question is whether that tribunal is to be the visitor or the courts. For students who seek to have a university decision set aside or reversed the advice in most cases should be 'Go to the visitor, not to the courts.' Second, there is much to be said in favour of the visitor as against the courts as an appropriate tribunal for disputes of the type which fall within the visitatorial jurisdiction. In place of the formality, publicity and expense of proceedings in court, with pleadings, affidavits and all the apparatus of litigation (including possible appeals to the Court of Appeal and, perhaps, to the House of Lords), there is an appropriate domestic tribunal which can determine the matter informally, privately, cheaply and speedily, and give a decision which, apart from any impropriety or excess of jurisdiction, is final and will not be disturbed by the courts. This aspect of the matter has been the subject of repeated high judicial approval: see *Attorney-General v. Talbot* (1748) 3 Atk. 662, 674, 676, *per* Lord Hardwicke L.C.; *St. John's College, Cambridge v. Todington* 1 Burr. 153, 199, 200 *per* Lord Mansfield C.J.; *Ex parte Wrangham* 2 Ves. 609, 619, *per* Lord Loughborough L.C.; *Thomson v. University of London* 33 L.J.Ch. 625, 635, *per* Kindersley V.-C; and *Rex v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127, 132, *per* Lord Goddard C.J. Third, the extent of visitatorial jurisdiction in university life has greatly expanded in recent years. When Oxford and Cambridge were the only universities in England, a relatively small portion of the university population was within the visitatorial jurisdiction, and then only in relation to the colleges; and for those universities that remains true today. But with the founding of the 19th century universities came the general extension of the visitatorial jurisdiction to all the undergraduate members, instead of only the scholars. The same applies to the 20th century universities, as appears from a valuable article by Dr. J. W. Bridge at (1970) 86 L.Q.R. 531, to which Mr. Picarda referred me (I am indebted to this article as well as to the lucid restatement of the law governing visitors which is set out in a book which Mr. Picarda studiously refrained from citing, Picarda's *The Law and Practice Relating to Charities* (1977), pp. 422–433.) The general picture of only a small part of the small undergraduate population of the universities being within the visitatorial jurisdiction has changed into a picture of the great majority of the far larger undergraduate population of the universities being within it. The visitatorial jurisdiction exercisable by the Lord Chancellor on behalf of the Crown must now be of formidable dimensions; for in most of the modern universities the Crown appears to be the visitor."

A B C D E F G

It is common ground that where the visitatorial jurisdiction exists it is an exclusive jurisdiction. The review of the authorities by my noble and learned friend Lord Griffiths clearly establishes this principle. Accordingly, the essential issue for decision by your Lordships is the scope of that jurisdiction. Miss Thomas's submission is encapsulated in the final sentence of the judgment of Whitford J. [1986] Ch. 381, 395 where he

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said: "By writing the rules into the contract the question at issue has been brought within the jurisdiction of the court . . ."

In the Court of Appeal, Fox L.J. stated the matter equally shortly, in these terms at p. 408:

> "But, as at present advised, I think that (subject to judicial review) the visitor must decide who is or is not to be a member of the house. Remedies for breaches of contract are for the courts."

In order to consider the scope of the visitatorial jurisdiction the historic basis and justification for that jurisdiction must first be considered. An eleemosynary corporation is a corporation founded for the purpose of distributing the founder's bounty. The purpose of the visitor's jurisdiction is the supervision of the internal rules of the foundation so that it is governed in accordance with those private laws which the founder has laid down to regulate the objects of his benefaction. Clearly, this supervision cannot be restricted merely to interpreting the statutes. For the supervision to be effective it must involve ensuring that the statutes, properly interpreted, are also being properly applied and observed.

The clearest modern statement of the scope of the jurisdiction is to be found in the Irish case, *In re Wislang's Application* [1984] N.I. 63, 81 by Kelly L.J.: see ante, pp. 688E–689B. This statement is consistent with the view expressed by Hoffmann J. in *Hines v. Birkbeck College* [1986] Ch. 524 where he said, at p. 543:

> "In my judgment the dispute is no less domestic because the rules, customs or procedures in issue are alleged to constitute terms of a contract or because their construction or the questions of fact involved in their application are equally conveniently justiciable in a court."

The view expressed by Hoffmann J. is also equally consistent with that expressed by Brightman J. in *Herring v. Templeman* [1973] 2 All E.R. 581, 591:

> "In the action with which I am concerned, the plaintiff's case is that he did not have a hearing before the academic board, that he did not have a fair hearing before the governing body and that the procedure of his dismissal was defective. In my judgment, these are essentially matters which touch the internal affairs of government of the college and are therefore matters confined by law to the exclusive province of the visitor. The dismissal of a student teacher for failing, in the opinion of those charged with the task of forming an opinion, to match up to the standard required of a teacher is the inevitable duty of an educational establishment which holds examinations and passes out students whom it considers fit to be teachers. The training of a student teacher and the assessment of his competence is the main and indeed the only object of a teacher-training college. The construction of the regulations of the college and the carrying into effect of those regulations in relation to persons who subject themselves to those regulations are, in my

view, matters which the decided authorities have committed to the exclusive jurisdiction of the visitor."

The source of the obligation upon which Miss Thomas relies for her claim is the domestic laws of the university, its statutes and its ordinances. It is her case that the university has failed either in the proper interpretation of its statutes or in their proper application. Miss Thomas is not relying upon a contractual obligation other than an obligation by the university to comply with its own domestic laws. Accordingly, in my judgment, her claim falls within the exclusive jurisdiction of the visitor, subject always to judicial review.

As regards the visitor's jurisdiction to award "damages" I see no practical problem. The visitor in the course of his supervisory jurisdiction must be entitled, in order to ensure that the domestic law is properly applied, to redress any grievance that has resulted from the misapplication of that domestic law. Such redress may involve ordering the payment of arrears of salary in the case in which the visitor decides that the employment has not been determined, or compensation where the complainant has accepted the wrongful repudiation of his contract of employment. It has not been submitted to your Lordships that where such an order is made, there would be any realistic risk of the university failing to comply with the order.

Accordingly, I would allow the appeal.

Appeal allowed. Cause to be remitted to Chancery Division with direction that the action be struck out.
No order for costs in the House of Lords.

Solicitors: Robbins Olivey & Blake Lapthorn for Sampson Wade, Bradford; Goldsmith Williams, Birkenhead.

J. A. G.

A [HOUSE OF LORDS]

CREST HOMES PLC. . . . . RESPONDENTS

AND

MARKS AND OTHERS . . . . . APPELLANTS

CREST HOMES PLC. . . . . RESPONDENTS

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MARKS AND OTHERS . . . . . APPELLANTS

[CONJOINED APPEALS]

C 1987 Feb. 18, 19, 20 — May, Croom-Johnson and Nourse L.JJ.

1987 June 2, 3, 4; July 9 — Lord Keith of Kinkel, Lord Templeman, Lord Griffiths, Lord Mackay of Clashfern and Lord Oliver of Aylmerton

Practice—Discovery—Use of documents—Action for infringement of copyright—Documents discovered and affidavits sworn pursuant D *to Anton Piller order—Implied undertaking not to use documents or affidavits for other purposes—Whether applicable to contempt proceedings in separate action—Application for leave to use documents and affidavits in contempt proceedings—Whether leave to be granted—Supreme Court Act 1981 (c. 54), s. 72*[1]

In 1984, the plaintiff company and a subsidiary commenced an action against the first and second defendants alleging, inter E alia, breach of copyright and obtained an *Anton Piller* order in respect of copies and originals of the plaintiffs' documents relating to 60 of their house designs. That order having been executed, it appeared to the plaintiffs that only two of their designs had been copied by the defendants and that the defendants had retained no other documents relating to those designs. In 1985, the plaintiffs, suspecting that another of their designs, not covered by the 1984 order, had been substantially F copied by the defendants, commenced another action and obtained an *Anton Piller* order in that action in respect of 105 of their house designs, including all those covered by the 1984 order. On execution of the 1985 order, a number of allegedly infringing drawings were discovered, many of which the plaintiffs claimed should have been disclosed pursuant to the 1984 order or were evidence of breaches of undertakings given in that G action. The plaintiffs applied to the court for leave to use the documents obtained on the execution of the 1985 order and the affidavits sworn by the defendants in purported compliance therewith for the purpose of, inter alia, considering and, if so advised, taking proceedings for contempt of court in respect of the 1984 order. The judge refused the application. The Court of Appeal allowed an appeal by the plaintiffs.

On appeal by the first, second and fourth defendants:—

H *Held*, dismissing the appeal, that the implied undertaking on discovery in an action not to use the discovered material for any purpose other than the proper conduct of that action was given

[1] Supreme Court Act 1981, s. 72: see post, pp. 855F—856C.

to the court and could, in appropriate circumstances, be released or modified by the court, though the importance as a matter of general policy of preserving its integrity was to be emphasised; that no injustice would be done to the defendants if the documents in question were made available for use in the 1984 action for the purposes of proceedings for contempt; and that, accordingly, in the very special circumstances of the case, including the circumstance that it was purely adventitious that there were two actions and that in substance they were a single set of proceedings, the plaintiffs should be released from their implied undertaking (post, pp. 851C–E, 853F–854B, 858A, 859E, 860C, 860H–861A).

A. J. Bekhor & Co. Ltd. v. Bilton [1981] Q.B. 923, C.A. considered.

Per curiam. (i) The proper policing and enforcement of observance of orders made and undertakings given to the court in an action are as much an integral part of the action as any other step taken by a plaintiff in the proper prosecution of his claim. Proceedings for contempt of court are in no way "collateral" to the action in which they are launched (post, pp. 851C–E, 860E–G).

(ii) Section 72 of the Supreme Court Act 1981 has only a peripheral significance in the solution of the present problem. Subsection (4) was probably inserted out of an abundance of caution in order to forestall any possible argument that subsection (3) afforded any protection in cases of contempt of court or perjury whether or not they could be brought under the umbrella of "related offences" (post, pp. 851C–E, 855B, 856G–H).

Decision of the Court of Appeal, post, p. 834B; [1987] 3 W.L.R. 48 affirmed.

The following cases are referred to in the opinion of Lord Oliver of Aylmerton:

Alterskye v. Scott [1948] 1 All E.R. 469

Anton Piller KG v. Manufacturing Processes Ltd. [1976] Ch. 55; [1976] 2 W.L.R. 162; [1976] 1 All E.R. 779, C.A.

Bekhor (A. J.) & Co. Ltd. v. Bilton [1981] Q.B. 923; [1981] 2 W.L.R. 601; [1981] 2 All E.R. 565, C.A.

Comet Products U.K. Ltd. v. Hawkex Plastics Ltd. [1971] 2 Q.B. 67; [1971] 2 W.L.R. 361; [1971] 1 All E.R. 1141, C.A.

Halcon International Inc. v. Shell Transport and Trading Co. [1979] R.P.C. 97, C.A.

Home Office v. Harman [1983] 1 A.C. 280; [1982] 2 W.L.R. 338; [1982] 1 All E.R. 532, H.L.(E.)

Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyd's Rep. 509, C.A.

Rank Film Distributors Ltd. v. Video Information Centre [1982] A.C. 380; [1981] 2 W.L.R. 668; [1981] 2 All E.R. 76, H.L.(E.)

Riddick v. Thames Board Mills Ltd. [1977] Q.B. 881; [1977] 3 W.L.R. 63; [1977] 3 All E.R. 677, C.A.

Sybron Corporation v. Barclays Bank Plc. [1985] Ch. 299; [1984] 3 W.L.R. 1055

The following additional cases were cited in argument in the House of Lords:

CBS Songs Ltd. v. Amstrad Consumer Electronics Plc. [1987] R.P.C. 417, C.A.

Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd. [1975] Q.B. 613; [1974] 3 W.L.R. 728; [1975] 1 All E.R. 41

E.M.I. Records Ltd. v. Spillane [1986] 1 W.L.R. 967; [1986] 2 All E.R. 1016

Goddard v. Nationwide Building Society [1987] Q.B. 670; [1986] 3 W.L.R. 734; [1986] 3 All E.R. 264, C.A.

Helliwell v. Piggott-Sims [1980] F.S.R. 356, C.A.

Hytrac Conveyors Ltd. v. Conveyors International Ltd. [1983] 1 W.L.R. 44; [1982] 3 All E.R. 415, C.A.

Reg. v. Coote (1873) L.R. 4 P.C. 599, P.C.

Universal City Studios Inc. v. Hubbard [1984] Ch. 225; [1984] 2 W.L.R. 492; [1984] 1 All E.R. 661, C.A.

Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (No. 1 and No. 2), In re [1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434, H.L.(E.)

The following cases are referred to in the judgment of Nourse L.J.:

E.M.I. Records Ltd. v. Spillane [1986] 1 W.L.R. 967; [1986] 2 All E.R. 1016

Home Office v. Harman [1983] 1 A.C. 280; [1982] 2 W.L.R. 338; [1982] 1 All E.R. 532, H.L.(E.)

Rank Film Distributors Ltd. v. Video Information Centre [1982] A.C. 380; [1981] 2 W.L.R. 668; [1981] 2 All E.R. 76, H.L.(E.)

Riddick v. Thames Board Mills Ltd. [1977] Q.B. 881; [1977] 3 W.L.R. 63; [1977] 3 All E.R. 677, C.A.

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Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd. [1975] Q.B. 613; [1974] 3 W.L.R. 728; [1975] 1 All E.R. 41

Halcon International Inc. v. Shell Transport and Trading Co. [1979] R.P.C. 97, Whitford J. and C.A.

Hytrac Conveyors Ltd. v. Conveyors International Ltd. [1983] 1 W.L.R. 44; [1982] 3 All E.R. 415, C.A.

Redfern v. Redfern [1891] P. 139, C.A.

Universal City Studios Inc. v. Hubbard [1983] Ch. 241; [1983] 2 W.L.R. 882; [1983] 2 All E.R. 596; [1984] Ch. 225; [1984] 2 W.L.R. 492; [1984] 1 All E.R. 661, C.A.

APPEAL from Whitford J.

By an amended writ, originally issued on 25 November 1985, the plaintiff, Crest Homes Plc., claimed against the defendants, David Terrence Marks, Wiseoak Homes Ltd., Barry J. Best and Wiseoak Residential Ltd., inter alia, (1) an injunction restraining each defendant from infringing the plaintiff's copyright in its original drawings relating to its house designs, converting to their own use infringing copies of

such drawings, or misusing confidential information belonging to the plaintiff; (2) delivery up or destruction on oath of all infringing copies of the plaintiff's copyright works in the possession, custody or power of any of the defendants; and (3) discovery on oath of all documents and information relating to the defendants' allegedly wrongful acts. On the same day Whitford J. granted the plaintiff an *Anton Piller* order in respect of any of its drawings relating to certain of its house designs, any drawing or other document which represented the whole or any substantial part of any of the plaintiff's drawings relating to those house designs, including in particular all documents relating to the second defendant's "Larchvale" house design, documents relating to planning applications made by the second defendant which were founded upon or included any such document, and written instructions to and communications with the draftsmen of any such document. That order having been executed, Warner J. on 19 December 1985 made an order restraining the first defendant until judgment or further order from commencing to build any house or flat to any of nine of the defendants' designs copies of which had been removed from their possession pursuant to the *Anton Piller* order, or making or pursuing any planning application for permission to commence the building of any such house or flat, or parting with possession, custody or control of (other than to the plaintiff's solicitors), or hiding, defacing or destroying any document in their possession, custody or control relating to any such house or flat, or to any such planning application, or which was the property of the plaintiff (or a copy thereof); the second and fourth defendants gave an undertaking in the same terms.

By a notice of motion dated 24 January 1986 the plaintiff applied, inter alia, for orders (1) that the plaintiff and Crest Homes (Westerham) Ltd. be at liberty to make use of all documents removed by the plaintiff's solicitors from the second defendant's premises upon the execution of the *Anton Piller* order of 25 November 1985 for the purpose of their conduct of Chancery action 1984 C. No. 5743; (2) that the plaintiff be at liberty to make use of such documents for the purpose of considering and, if so advised, preparing, commencing and conducting proceedings in connection with breaches of orders made against, and undertakings given by, the first and second defendants in the 1984 action; (3) that for the purpose of making such uses of those documents the plaintiff's solicitors be released from the undertaking contained in the 1985 *Anton Piller* order that the documents obtained as a result of that order would be retained by them in safe custody; and (4) an order that the plaintiff be released from the implied undertaking not to make use of the documents except for the purpose of the conduct of the 1985 proceedings. On 28 February 1986 Whitford J. dismissed the motion and refused the plaintiff leave to appeal.

Pursuant to leave granted by Slade L.J. on 22 April 1986, the plaintiff, by a notice of appeal dated 30 April 1986, appealed seeking orders as set out in the notice of motion or, as an alternative to number (2), a declaration that the plaintiff's implied undertaking not to make use of the documents and affidavits did not extend to preclude their use for the purpose of contempt proceedings and in particular did not

preclude the bringing of contempt proceedings in connection with contempts evidenced by such documents or affidavits. The grounds of the appeal were (1) that, if and in so far as the judge had held that the court had no discretion to permit the use of documents or affidavits disclosed pursuant to a court order to be used in contempt proceedings, he had erred in law, and he ought to have held that the court had a discretion, to be exercised according to the circumstances of the case; (2) that the judge had erred in law in holding that such a discretion might arise only in respect of a document which disclosed that a party had deliberately breached an order of the court, and any exercise of his discretion was therefore founded upon a mistake of law; (3) that the judge had wrongly disregarded the evidence before him of breaches of the orders in the 1984 action, and ought to have considered such evidence and to have held that a prima facie case of breaches of such orders had been made out; (4) that the judge had wrongly founded his decision on the fact that no proceedings for contempt by breaches of the orders in the 1984 action had at that time been instituted by the plaintiff, which was irrelevant to the exercise of the judge's discretion and ought to have been disregarded since the plaintiff could not have instituted such proceedings without the leave which it sought on the application; (5) that the judge had disregarded the fact that the defendants had complied without objection with the 1985 *Anton Piller* order without any claim of privilege, which fact was relevant to the exercise of his discretion; (6) that the judge had wrongly paid attention to the form of the plaintiff's application, and had been wrongly influenced to refuse the orders sought because of that form, which had been dictated by the need to obtain leave; (7) alternatively, that leave to use discovery documents and affidavits in contempt proceedings was not required; (8) that the judge had wrongly refused leave for the documents and affidavits to be used in connection with the 1984 action generally; that he ought to have held, in accordance with the evidence, that a case had been made out for the relevance of such documents, and their use in the 1984 action ought to have been permitted; (9) that the judge had wrongly held that if the documents had not been disclosed in the 1984 action the plaintiffs in that action would be able to secure discovery on a suitable application directed to the disclosure of specific documents, since those plaintiffs would have been able to make such an application without the leave sought on the application; (10) that the judge had wrongly held that, if there were to be any question of using affidavits sworn in the 1985 action in connection with the 1984 action, it was a matter which could only properly be determined by the judge at the trial as and when application to introduce such affidavits was made; (11) that the judge ought to have held, having regard to the common questions of law and fact which arose in both actions and since the rights to relief claimed in both actions arose out of the same transactions, that for the convenience of the parties generally free interchange of documents between the two actions ought to be permitted; (12) that the judge ought to have allowed an amendment to the notice of motion permitting the plaintiff to include within the scope of the application the affidavits sworn in purported compliance with the 1985 *Anton Piller* order; (13)

that the judge had wrongly disregarded the fact that it was the plaintiff's case that, had full disclosure been made in accordance with the order in the 1984 action, the need for the application would not have arisen; and (14) that in the premises the judge had been wrong to refuse the leave sought by the plaintiff.

The facts are stated in the judgment of Nourse L.J.

Roger Henderson Q.C. and *Christopher Floyd* for the plaintiff.
Paul Dickens for the first defendant.
Geoffrey Hobbs for the second and fourth defendants.

Nourse L.J. delivered the first judgment. This is an appeal from an interlocutory decision of Whitford J. given on 28 February 1986 in an action for infringement of copyright in house designs and misuse of confidential information. Shortly stated, the sole question now in issue is whether the plaintiff can make use of documents obtained on the execution of an *Anton Piller* order for the purpose of considering and, if so advised, taking proceedings for contempt of court in respect of breaches of an earlier such order made in another action between much the same parties and covering much of the same ground. The outcome of that question depends primarily on the interaction between (1) the implied undertaking that the documents will not be used for any collateral or ulterior purpose; (2) the privilege against self-incrimination; and (3) the provisions of section 72 of the Supreme Court Act 1981.

The plaintiff in this action ("the 1985 action") is Crest Homes Plc. Both it and the second and fourth defendants, Wiseoak Homes Ltd. and Wiseoak Residential Ltd., are companies engaged in the development of residential land and the sale of residential properties. The first defendant, Mr. David Terrence Marks, was formerly employed by the plaintiff and he was a director of its subsidiary called Crest Homes (Westerham) Ltd. The third defendant, Mr. Barry J. Best, is not affected by the order appealed from and he is not a party to the appeal.

In November 1984 an earlier action ("the 1984 action") was commenced by the plaintiff and its Westerham subsidiary against Mr. Marks, Wiseoak Homes Ltd. and another individual who is not a party to the 1985 action. In June 1985 another individual and two other companies, none of whom is a party to the 1985 action, were joined to the 1984 action by amendment.

On 23 November 1984 Scott J. made an *Anton Piller* order in the 1984 action. It appears that at that date Mr. Marks was still technically an employee of the plaintiff, although he had handed in his resignation on 1 November and had left to join the second defendant.

The 1984 order was applied for because the plaintiff had discovered that planning applications had been made by the second defendant, using drawings which reproduced the plaintiff's own drawings for two of its house types called "Carrington" and "Linslade" and for which it claims copyright.

In paragraph 39 of an affidavit sworn on 11 December 1984, Mr. Marks agreed that the plans in question used the Carrington and Linslade designs of the plaintiff. He accepted that those plans were

copied from the plaintiff's drawings, although he then made several points in mitigation.

The 1984 order, which was in a usual form, was executed at Mr. Marks's home and also at the second defendant's registered office. The plaintiff says that it was not aware that the second defendant had premises at any other location. The 1984 order was not restricted to the Carrington and Linslade designs. It extended to copies or originals of the plaintiff's documents relating to 59 house designs listed in an exhibited schedule and one further design.

The material provisions of the 1984 order were: (1) injunctions against—(*a*) making use of any of the relevant documents or the information derived therefrom, and (*b*) making planning applications which utilised drawings reproducing the designs of any of the 60 house types; (2) a power to search for and remove from Mr. Marks's home the relevant documents; (3) an order for the disclosure of the whereabouts of the relevant documents; (4) an order for delivery up within 24 hours of all relevant documents not already removed; (5) an order for the swearing of affidavits of compliance by or on behalf of the defendants, including Mr. Marks.

On 30 November 1984, in response to the 1984 order, Mr. Marks swore a short affidavit in which he said that he was not in possession of any of the documents or information required by that order.

In paragraphs 40 and 41 of the much longer affidavit which he swore on 11 December 1984, Mr. Marks said that he no longer had in his possession any originals or copies of the Crest book of house designs or brochures of various Crest developments containing details of Crest house designs. In paragraphs 64 and 65 he said:

> "64. I wish to deal with the allegations made about Crest documents that I allegedly have in my possession. As I have already indicated, the documents exhibited at D.T.M.1. are the only Crest documents I have in my possession. 65. I do not have any details of the Linslade and Carrington House type. I have not taken any documents relating to the internal costing and profit margin information of Crest, as set out in paragraphs 44 and 48 of Mr. Czezowski's affidavit. Nor do I have my own copy of the Crest book of House Designs, or any copies thereof."

The documents contained in exhibit D.T.M.1. were those which had been removed from Mr. Marks's home on the execution of the 1984 order.

The plaintiff says that it appeared to it from this evidence, first, that nothing other than Carrington and Linslade designs had been copied and, secondly, that no other documents relating to those designs were then retained by the defendants. The 1984 action proceeded, they say, upon that basis.

However, in October 1985 the plaintiff discovered that another type of house, bearing similarities to one of their own, was being advertised by the second defendant under the name "Larchvale." It inspected the relevant planning applications and concluded that the design was substantially copied from its own "Versailles" design. That design was

not one of the 60 which were covered by the 1984 order. Furthermore, it was possible that all relevant infringements and misuses of confidential information had occurred after the issue of the writ in the 1984 action. It was for that reason, says the plaintiff, that a second action, the 1985 action, was started. An *Anton Piller* order was made in that action by Whitford J. on 25 November 1985. On this occasion it extended to documents relating to 105 of the plaintiff's house designs, including all of the 60 which had been covered by the 1984 order. Subject to that, the order was in much the same form.

The 1985 order was executed at the second defendant's trading premises. The plaintiff claims that a large number of infringing drawings were there discovered, many of which it says either ought to have been disclosed pursuant to the 1984 order, or were compelling evidence of breaches of the injunctions contained therein. In particular, the plaintiff contends that certain documents which relate to the Carrington and Linslade types (including a specification for the former) fall within the terms of the 1984 order and that the continued possession of them was contrary to the first defendant's statements in his 1984 affidavits already referred to.

In paragraph 3(a) of an affidavit sworn in the 1985 action on 17 December 1985, the first defendant said:

> "each and every document taken away by the plaintiff's representative pursuant to the order was in my possession when my own home was searched pursuant to an *Anton Piller* order made in 1984 and they were all then (in 1984) inspected by officers of the court and representatives of the plaintiff and were left with me as being of no relevance. I did not destroy or conceal those documents believing that if I had, the plaintiff may have subsequently claimed a breach of the order or used such destruction or concealment as an indication of 'guilt' in that 1984 action. I therefore took all the documents, save as below, to my office at 166, Main Road, Sundridge, as aforesaid where they have since lain undisturbed with my 'dead' filing. I respectfully ask the plaintiff's representative who searched my office to confirm this precise location."

That then is the background to this case. The plaintiff wished to make use of the documents obtained on the execution of the 1985 order, and also the affidavits sworn in purported compliance therewith, for the purposes of the 1984 action in two respects: first, in the general conduct of that action; secondly, for the purpose of considering and, if so advised, taking proceedings for contempt of court in respect of breaches of the 1984 order. However, it was advised that it could not take that course without applying to the court.

The plaintiff's application came before Whitford J. on 28 February 1986, when it was refused in both respects. The matter has to some extent been overtaken by events, because on 25 June 1986 the master made an order by consent for the 1984 and 1985 actions to come on for trial at the same time; and a date has been obtained for the autumn of this year. Early yesterday morning, the second day of the hearing in this court, while Mr. Henderson was still opening the appeal on behalf of

A the plaintiff, an agreement was arrived at between the parties in regard to the first part of the plaintiff's application. It is now agreed that the plaintiff may make use of the documents and affidavits in question in the general conduct of the 1984 action. In the light of that agreement it appears entirely proper that leave should be given by the court accordingly. As to that agreement, I need say no more than that it B appears to be entirely in accordance with common sense and the practicalities of the matter, especially now that the two actions are to be heard together. It would be quite impracticable either to prepare for, or to conduct, the trial on any other basis.

In the circumstances, it remains for us to decide whether the plaintiff can make use of the 1985 documents and affidavits for the purpose of considering and, if so advised, taking proceedings for contempt of court C in respect of breaches of the 1984 order.

The first point to be made is that the 1985 order contained the usual undertaking on the part of the plaintiff's solicitors to retain in safe custody any documents obtained as a result of the order. However, it is not suggested that that undertaking raises any additional impediment to the plaintiff's objectives. In other words, if its objectives are otherwise D unobjectionable, there will be no objection to that undertaking being modified to the necessary extent. The question is then seen to depend in the first instance on the applicability of the implied undertaking by the plaintiff and its solicitors that neither the originals nor copies of the documents will be used for any collateral or ulterior purpose. The continued existence and force of that undertaking has been authoritatively reaffirmed by the House of Lords in *Home Office v. Harman* [1983] 1 E A.C. 280. Here it is worth pointing out that the part of an *Anton Piller* order which requires the delivery up of documents and the swearing of affidavits of compliance is nothing more nor less than an order for early discovery.

The first question which arises is whether the implied undertaking applies at all in the circumstances of this case. Mr. Henderson submits F that it does not. I reject that submission. In my judgment the use of documents disclosed in one action for the purposes of another action will usually, perhaps invariably, be a collateral or ulterior purpose. That, I think, is the view which has consistently been taken in the previous authorities, even where the parties to both actions are identical: see *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881. It is true that in that case the cause of action in the second proceedings was quite G different from that in the first, but it does not at all follow that the undertaking will not apply even where there is an absolute identity of parties and causes of action. That is a state of affairs which does not obtain in the present case and on which it is neither necessary nor desirable to express a view. Here it is enough to say that there is no identity in either respect. Moreover, I think that the court should err on H the side of maintaining the applicability of the undertaking unless it is clearly demonstrated that it can perform no useful function. I think that the judgment of Scott J. in *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299, where it was held that the undertaking applied to a case

in which there was an identity of causes of action although not of parties, supports this approach.

The next point to be made is that the implied undertaking, like any other undertaking, can be released or modified with the leave of the court. We were referred to a number of recent cases in which this course has been taken, of which I need only refer again to *Sybron Corporation v. Barclays Bank Plc.* and also to the recent decision of Sir Nicolas Browne-Wilkinson V.-C. in *E.M.I. Records Ltd. v. Spillane* [1986] 1 W.L.R. 967. Mr. Henderson has advanced a number of reasons for taking this course in the present case, including in particular the public interest in seeing that orders of the court are complied with. He also relies strongly on the fact that the purpose of the undertaking is to encourage full and frank discovery by giving a protection to those who make it. He says that there is enough material before the court in the present case, in particular the documents relating to the Carrington and Linslade designs and the first defendant's evidence in relation thereto, to suggest the possibility that full and frank disclosure has not been made. Therefore, says Mr. Henderson, the first and second defendants do not deserve and are not entitled to the protection. He also relies on the facts that this is not a case where it is desired to communicate the documents to a third party, that the property in them or many of them is the plaintiff's, and that the 1985 action was only started as a separate action because the plaintiff was in part misled by the first defendant's evidence.

There can be no doubt that there is great force in Mr. Henderson's submissions and, as at present advised, I think that they would certainly have been conclusive in regard to the first part of the plaintiff's application had it been necessary for them to argue it. But what we have to consider is whether the undertaking should be modified for the purpose of proceedings for contempt of court. Here Mr. Hobbs, for the second and fourth defendants (whose arguments were adopted by Mr. Dickens on behalf of the first defendant) has raised a powerful argument based on the privilege against self-incrimination. He says, correctly, that proceedings for contempt of court, albeit for a civil contempt, are in the nature of criminal proceedings. Then he says, also correctly, that the court would never make an order for discovery for the purpose, pure and simple, of enabling such proceedings to be brought. From there he goes on to say that the 1985 order was superfluous in so far as it covered the 60 house designs which had already been covered by the 1984 order. Accordingly, if the court were now to modify the undertaking, the manifest result, so far as concerned documents already discoverable under the 1984 order, for example the Carrington and Linslade documents, would be that the 1985 order had become one for discovery for the purpose, pure and simple, of enabling proceedings for contempt to be brought. Therefore, says Mr. Hobbs, the necessary leave should not, as a matter of discretion, be given.

Again, it seems to me that there is great force in Mr. Hobbs's submissions standing on their own. I am prepared to assume that they might well have prevailed, had it not been for section 72 of the Supreme Court Act 1981, which was enacted following the decision of the House of Lords in *Rank Film Distributors Ltd. v. Video Information Centre*

[1982] A.C. 380. Section 72, to which the marginal note is "Withdrawal of privilege against incrimination of self or spouse in certain proceedings," provides:

> "(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse, to proceedings for a related offence or for the recovery of a related penalty—(*a*) from answering any question put to that person in the first-mentioned proceedings; or (*b*) from complying with any order made in those proceedings. (2) Subsection (1) applies to the following civil proceedings in the High Court, namely—(*a*) proceedings for infringement of rights pertaining to any intellectual property or for passing off; (*b*) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off; and (*c*) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off. (3) Subject to subsection (4), no statement or admission made by a person—(*a*) in answering a question put to him in any proceedings to which subsection (1) applies; or (*b*) in complying with any order made in any such proceedings, shall, in proceedings for any related offence or for the recovery of any related penalty, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the spouse of that person. (4) Nothing in subsection (3) shall render any statement or admission made by a person as there mentioned inadmissible in evidence against that person in proceedings for perjury or contempt of court."

Subsection (5) is a definition provision which starts by defining the expression "intellectual property," to include any copyright. I read the next two definitions in full:

> " 'related offence,' in relation to any proceedings to which subsection (1) applies, means—(*a*) in the case of proceedings within subsection (2)(*a*) or (*b*)—(i) any offence committed by or in the course of the infringement or passing off to which those proceedings relate; or (ii) any offence not within sub-paragraph (i) committed in connection with that infringement or passing off, being an offence involving fraud or dishonesty; (*b*) in the case of proceedings within subsection (2)(*c*), any offence revealed by the facts on which the plaintiff relies in those proceedings; 'related penalty,' in relation to any proceedings to which subsection (1) applies means—(*a*) in the case of proceedings within subsection (2)(*a*) or (*b*), any penalty incurred in respect of anything done or omitted in connection with the infringement or passing off to which those proceedings relate; (*b*) in the case of proceedings within subsection (2)(*c*), any penalty incurred in respect of any act or omission revealed by the facts on which the plaintiff relies in those proceedings."

Although it requires some study to understand the effect of section 72, I think that once that has been done its effect for present purposes is

clear. There can be no doubt that the 1984 and 1985 actions are civil proceedings within subsection (2)(*a*), and it appears that they are also within (*b*) and (*c*) as well. Mr. Henderson's first suggestion was that proceedings for contempt of the 1984 order would themselves fall within subsection (2) on the ground that they would be proceedings taken in proceedings of the kind there specified. I do not think that that can be right. Both on principle and on the true construction of subsections (2) and (4), it seems clear that proceedings for contempt are to be treated as separate proceedings. However, that does not invalidate Mr. Henderson's argument on section 72 as a whole, because when subsections (3) and (4) are read together it is clear that the withdrawal of the privilege which is effected by subsection (1) applies just as much to the proceedings mentioned in subsection (4) as it does to those mentioned in subsection (2).

The argument has centred mainly on the effect of subsections (3) and (4). The general effect of subsection (3) is to make statements or admissions made in proceedings to which subsection (1) applies (i.e. those specified in subsection (2)) inadmissible in evidence against the maker of them in proceedings for any related offence or for the recovery of any related penalty. But then the effect of subsection (4) is to make such statements and admissions so admissible in proceedings for perjury or contempt of court based on such statements or admissions. Mr. Hobbs submits that the effect of subsection (4) is to preserve a discretion in the court as to whether the statements or admissions should be admitted in evidence. I do not think that that is correct as a matter of the construction of section 72. It seems clear from the double negative in subsection (4), when read with subsection (3), that the statements and admissions must be admitted. On the other hand, I would accede to Mr. Hobbs's alternative submission, which is that the provisions of section 72 cannot remove the discretion of the court as to whether the implied undertaking should be released or modified in the case to which the undertaking already applies. It is to that final question that I now turn.

Mr. Henderson, while accepting that section 72 does not automatically conclude the point in the plaintiff's favour, nevertheless submits that its existence means that the court should usually exercise its discretion in favour of the necessary release or modification. I do not find it necessary to accept the proposition in that form, although it is impossible to ignore the fact that the clear purpose of the section was to withdraw the privilege against self-incrimination in intellectual property cases. It seems to me that, as with every discretion, each case must depend on its own facts. In the present case it becomes necessary to return to the reasons advanced by Mr. Henderson, as I have already recorded them. After considering those reasons and all the contrary arguments which have been put forward by Mr. Hobbs, I have come to a clear conclusion that this is a case where the plaintiff's application should succeed.

In general I accept the reasons advanced by Mr. Henderson, and it is I think unnecessary to consider them separately or in any greater detail. I will, however, record that it appears to me that the material on which he relies establishes that there is a question of contempt to be investigated. It is not appropriate to put it higher than that.

It seems clear that the case was not as fully argued before Whitford J. as it has been before us. I do not think that the effect of section 72 can have been fully explored. The judge seems to have been favourably disposed towards the application in regard to contempt proceedings, although he did not refer to section 72. He refused that part of the application on the ground that it was premature. He thought that the plaintiff ought first to institute its proceedings for contempt. However, I respectfully agree with Mr. Henderson that that would have been impracticable, if only because the notice of motion would have had to specify with particularity the alleged breaches of the 1984 order. That is something which the plaintiff and its advisers could not have done unless and until they had been able to make full use of the documents in respect of which this application is made.

For the reasons which I have given I would allow this appeal.

Croom-Johnson L.J. I entirely agree and have nothing to add.

May L.J. I also agree that this appeal should be allowed for the reasons given by Nourse L.J. Although we are differing from the judge below, I do not think it necessary to add any further comments of my own.

Appeal allowed with costs in Court of Appeal and below.
Leave to appeal refused.

3 March. The court granted a stay of the order pending hearing of the first, second and fourth defendants' petitions for leave to appeal and, if allowed, of any appeal.

19 March. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Mackay of Clashfern and Lord Ackner) allowed petitions by the first, second and fourth defendants for leave to appeal.

Solicitors: Lovell White & King; William J. Stoffel & Co., Beckenham; Jaques & Lewis.

[Reported by Clive Scowen, Esq., Barrister-at-Law]

The first, second and fourth defendants appealed. The appeals were conjoined.

Andrew Morritt Q.C. and *Geoffrey Hobbs* for the second and fourth defendants. In a system in which complaints are made and defended.

before the court on an adversarial basis, it is incumbent on a complainant in contentious proceedings to state at the outset what charges he is making against the opposite party. He is ordinarily not entitled to call for discovery of documents or information with a view to finding out what charges might thereafter be made against the person called on to provide the documents or information. The proper course is for a complainant to press whatever charges he reasonably considers himself able to sustain and for the court thereafter to decide what discovery (if any) should be ordered and from whom in relation to the issues specifically raised by the complainant in the pending proceedings. It is a strict requirement in civil proceedings for contempt of court that the complainant should specify in his notice of motion for committal what particular breaches of which particular orders or undertakings the respondent to the motion is alleged to have committed: R.S.C., Ord. 52, r. 4. No questions of discovery can or should arise in relation to such proceedings in the absence of such a notice of motion, all the more so in a case such as the present where: (a) the plaintiffs' application by notice of motion dated 24 January 1986 presupposes the need for investigations with a view to ascertaining whether any, and, if so, what, allegations of contempt can be levelled against any, and, if so, which, of the appellants; (b) it was expressly acknowledged by counsel in the Court of Appeal that no charges of contempt had been formulated by the plaintiffs or answered by any of the appellants; (c) the Court of Appeal was expressly asked by counsel not to prejudge whether any of the appellants had committed any contempt of court. In any event, according to long-standing and well-settled principles the court does not make orders for discovery of information or documents (or for interrogatories) in aid of proceedings for contempt, and it did not do so when making the order of 25 November 1985 pursuant to which the documents and affidavits referred to in the order of the Court of Appeal dated 20 February 1987 were obtained. It would be wrong in principle to require an alleged contemnor to furnish evidence against himself to his accuser, all the more so at a time when no charges have been preferred against him: *Cornet Products U.K. Ltd. v. Hawkex Plastics Ltd.* [1971] 2 Q.B. 67. Furthermore, the order of 25 November 1985 was made on the plaintiffs' implied representation and undertaking that the documents and affidavits obtained thereunder would not be used (without the leave of the court) for any purpose other than the proper conduct of the action in which they were obtained. The making of such an order is conditional on the giving of such an undertaking. Without the leave of the court, the plaintiffs may not use the documents and affidavits in question for the purpose specified in their notice of motion dated 24 January 1986. In principle, the leave of the court is only to be given in special circumstances and not as a general rule: *Home Office v. Harman* [1983] 1 A.C. 280 and *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881. It would be contrary to the long-standing and well-settled principles referred to above to give the plaintiffs the benefit of discovery in aid of contemplated proceedings for contempt by releasing them from the undertaking that they impliedly gave when the order of 25 November 1985 was made. The undesirability of authorising the plaintiffs to use the

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documents and affidavits in question for the purpose specified in their notice of motion dated 24 January 1986 is increased by the fact that the discovery afforded by the order of 25 November 1985 was substantially superfluous to the requirements of the action in which the order was made and the fact that the duplication of orders and undertakings thereby accomplished was abusive of the process of the court.

The practice and procedure with regard to proceedings for contempt should be strictly enforced because of the quasi-criminal nature of the proceedings. There were no special circumstances here (cf. *E.M.I. Records Ltd. v. Spillane* [1986] 1 W.L.R. 967). To give leave would effectively be authorising discovery. [Reference was made to *A. J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923; *Hytrac Conveyors Ltd. v. Conveyors International Ltd.* [1983] 1 W.L.R. 44, 47–48 (Lawton L.J.); *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97; *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299; R.S.C., Ord. 24, r. 6 and *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc.* [1987] R.P.C. 417.]

Summarising, the long-established and well-settled principle that discovery is not available in aid of proceedings for contempt of court ought to be upheld in the absence of any clear and unambiguous statutory enactment to the contrary. The implied undertaking on the basis of which orders for discovery and particularly orders for discovery in *Anton Piller* form are made ought in principle and in practice to be strictly enforced and complied with. Discovery of information and documents ought always to be preceded by the formulation of charges or allegations specifically giving rise to issues for the judicial determination of which such discovery can be seen to be both necessary and proper.

Section 72 of the Supreme Court Act 1981 has not altered the law and practice of the court with regard to (a) the conduct and determination of civil proceedings for contempt; (b) the operation of the undertaking against the collateral use of information and documents obtained by way of discovery in civil proceedings. It has not altered the law in any respect relevant to this appeal. Even if it has, that would not justify the order of the Court of Appeal.

The only proceedings in which the privilege against incrimination of self or spouse is withdrawn by section 72 of the Act of 1981 are those to which subsection (1) applies, i.e. those specified in subsection (2). Civil proceedings for contempt are *not* proceedings to which subsection (2) applies. Such proceedings are, therefore, not proceedings from which the privilege against incrimination of self or spouse has been withdrawn by section 72.

The defendants are not attempting or intending to rely on the provisions of subsection (3) of section 72 in any proceedings brought against them for perjury or contempt of court. The exception to the operation of subsection (3) created by subsection (4) is, therefore, inapplicable and irrelevant in the present case. Subsection (4) deals with the matters described in subsection (3). It is a qualification of subsection (3). It cannot possibly cover the documents removed under the *Anton Piller* order. Subsections (3) and (4) do not withdraw any privilege against incrimination of self or spouse from any person in any

proceedings. Nor do they withdraw from any person the protective effect of the undertaking against the collateral use of information and documents obtained by way of discovery in civil proceedings. The fact that certain statements and admissions are rendered "not inadmissible" in certain proceedings by subsection (4) does not mean that such statements and admissions are, therefore, available to be tendered in evidence in such proceedings. The admissibility and the availability of the evidence are not co-extensive concepts: *Goddard v. Nationwide Building Society* [1987] Q.B. 670. Further, the question of admissibility cannot arise until there has been a motion and affidavit in accordance with the rules.

Section 72 is a statutory provision that ought to be construed in a narrow and conservative manner. On its true construction, it does not impinge on the operation of the general principles referred to above.

The appellants accept and rely on the decision and reasoning of the Court of Appeal on the following points: (a) that the documents and affidavits obtained under the order of 25 November 1985 may not be used for the purpose specified in the plaintiffs' Notice of Motion dated 24 January 1986 without the leave of the court; (b) that civil proceedings for contempt of court are not within the scope of section 72(2) of the Act of 1981; (c) that section 72 has not removed the discretion of the court to decide whether the plaintiffs should be released from their undertaking impliedly given when the order of 25 November 1985 was made.

The Court of Appeal erred fundamentally in holding in relation to section 72 that "the withdrawal of the privilege which is effected by subsection (1) applies just as much to the proceedings mentioned in subsection (4) as it does to those mentioned in subsection (2)" (*per* Nourse L.J., ante, p. 840B-C).

In deciding whether the plaintiffs should be released from their undertaking impliedly given when the order of 25 November 1985 was made the Court of Appeal reached a conclusion adverse to the appellants because of the construction that it had placed on section 72 as indicated above.

In so far as the Court of Appeal was entitled to exercise its discretion on the issues raised by the plaintiffs' notice of motion dated 24 January 1986, it erred fundamentally by not exercising its discretion in favour of the time-honoured and long-standing principle that discovery is not available in aid of proceedings for contempt.

Paul Dickens for the first defendant adopted the second and fourth defendants' submissions.

Roger Henderson Q.C., Christopher Floyd and *Richard Arnold* for the plaintiffs. The position at the hearing of the plaintiffs' motion before Whitford J. was that the documents that they sought leave to use in the manner specified were held by them subject only to the following restrictions: (a) the express undertaking in the 1985 order; (b) the implied undertaking on discovery; and (c) any constraint imposed on their use by the privilege against self-incrimination or by section 72 of the Act of 1981. In the Court of Appeal, it was not suggested by the

present appellants that the express undertaking raised any impediment to the plaintiffs additional to the matters on which the appellants rely.

In the Court of Appeal, the plaintiffs argued that the implied undertaking was of no relevance to this application because the purpose for which they wished to use the documents was not a "collateral or ulterior purpose" (see *Home Office v. Harman* [1983] 1 A.C. 280, 304–305 (Lord Diplock)). The Court of Appeal rejected that argument, and the plaintiffs do not intend to pursue it. This is, however, a proper case for the court to exercise its discretion to release them from their implied undertaking. [Reference was made to R.S.C., Ord. 27, r. 3.]

In the Court of Appeal, the present appellants placed considerable reliance on the privilege against self-incrimination. Due to section 72 they could not have succeeded in claiming that privilege to deny discovery of the documents in question on the execution of the 1985 order, and they cannot do so now. Furthermore, section 72 expressly provides, in subsection (4), that the restriction placed on the admissibility of evidence in respect of which the privilege has been withdrawn does not apply to proceedings for perjury or contempt of court. Section 72, therefore, presents no obstacle to the plaintiffs. On the contrary, it provides a clear indication that Parliament intended that in appropriate circumstances discovery documents could be used in perjury and contempt proceedings.

Section 72 was passed in response to the decision of the House in *Rank Film Distributors Ltd. v. Video Information Centre* [1982] A.C. 380 (see *per* Lord Russell of Killowen, at p. 448) and should be seen in the context of that case. The common law privilege against self-incrimination recognises that people should be encouraged to act as witnesses and that they might not be prepared to testify freely in the absence of a privilege. The purpose of section 72, like that of section 31 of the Theft Act 1968 and section 9 of the Criminal Damage Act 1971 before it, is to achieve a better balance between two competing interests: the interest in not excluding relevant evidence from a tribunal's consideration and the interest in obtaining evidence at all (albeit for the consideration of a different tribunal). The privilege against self-incrimination is a crude device because it excludes evidence from both criminal and civil tribunals. Section 72 is more sophisticated; it distinguishes between criminal and civil proceedings. Its scheme is to withdraw the witness's privilege of denying evidence to the civil tribunal but to protect him against criminal prosecution based on that evidence. Thus justice can be done between civil parties without coercing a man to give evidence against himself in a criminal matter. The section recognises, however, that even civil justice may depend on the availability of coercive means. The laws of perjury and contempt are a necessary part of the mechanism of litigation. This is the policy for the different treatment accorded by the section to proceedings for perjury and contempt and to criminal proceedings, notwithstanding the quasi-criminal aspect of the former, and it is a sound policy.

The effect of section 72 is, as the Court of Appeal held, that the appellants could not have relied on the privilege against self-incrimination to avoid discovery of relevant documents in the 1985 action. The

privilege is, therefore, not an answer to the present application. The 1985 action is a civil proceeding falling within all three of paragraphs (*a*), (*b*) and (*c*) of section 72(2). It is, therefore, a proceeding to which subsection (1) applies. Accordingly, the appellants would not have been excused, had they taken the point when the 1985 order was served on them, from complying with that order (subsection (1)(*b*)) "by reason that to do so would tend to expose [them] to proceedings for a related offence or for the recovery of a related penalty."

It is not necessary for present purposes to decide whether proceedings for contempt of court are proceedings in respect of an "offence" or proceedings for the recovery of a "penalty": they are one or the other, if not both: See *Comet Products U.K. Ltd. v. Hawkex Plastics Ltd.* [1971] 2 Q.B. 67, 74F (Lord Denning M.R.), 75G–H (Megaw L.J.), 77D (Cross L.J.). If the appellants are guilty of contempt, the offence or penalty is "related" within the definitions given in subsection (5) and so within the meaning of subsection (1). An infringement of the plaintiffs' copyright in respect of one of the 60 scheduled house types disclosed by documents removed pursuant to the 1985 order would be both (i) an infringement to which the 1985 proceedings relate and (ii) an offence committed by or in the course of that infringement or something done or omitted in connection with that infringement so as to be an offence or to incur a penalty (i.e. within part (a) of each definition), or revealed by the facts on which the plaintiffs rely in the 1985 proceedings (i.e. within part (b)), being a breach of the injunctions in the 1984 order.

If the appellants enjoyed no privilege to withhold discovery of documents that may now found proceedings for contempt or perjury, this should not cause concern. The public interest in ensuring full and frank discovery in intellectual property proceedings (which was the reason for enacting section 72) would be undermined if by partial discovery or untruthful affidavits or documents a litigant in such proceedings could improve his position in proceedings for contempt or perjury. To permit this would be to permit a dishonest litigant to profit from his dishonesty.

If it should be held that section 72 does not apply to withdraw the privilege in the present case, the privilege has been waived. It is well-established that the privilege is a privilege against answering a question or producing a document. Once answered or produced, the privilege cannot then be claimed, even if the witness was ignorant of his right to claim the privilege (*Reg. v. Coote* (1873) L.R. 4 P.C. 599). In the present case, the appellants were advised of their right to obtain legal advice before complying with the 1985 order, in accordance with the plaintiffs' undertaking. The question of privilege was not raised until the hearing before Whitford J., by which time the documents were in the plaintiffs' possession. It may be noted that the defendants in the *Rank* case [1982] A.C. 380, unlike the present appellants, applied immediately to discharge the *Anton Piller* order.

Although section 72(3) precludes statements or admissions arising out of proceedings within subsection (2) from being tendered in evidence against the maker of them in criminal proceedings, subsection (4) expressly provides that this does not affect the admissibility of such

A evidence in proceedings for perjury or contempt. In the Court of Appeal, the present appellants argued that the effect of this subsection was to preserve the court's discretion as to whether to admit evidence. The Court of Appeal, however, appeared to hold to the contrary. If that is the correct understanding of their decision, the plaintiffs would not seek to uphold that construction of subsection (4). Nevertheless, the law is correctly stated by the Court of Appeal inasmuch as, if a claim to B privilege fails, there is no discretion in civil cases to exclude admissible evidence. Alternatively, the discretion is one that is very rarely exercised and only for compelling reasons; furthermore, it is the discretion of the judge hearing the contempt proceedings. It is accepted that admissibility is not the same as availability, but see *Helliwell v. Piggott-Sims* [1980] F.S.R. 356.

C The plaintiffs accept, as they did in the Court of Appeal, that there is nothing in section 72 that compels the court to release an applicant from his implied undertaking on discovery. Section 72 is, however, a strong indication that normally leave will be given. Although this is, in truth, one of the factors to be taken into account when exercising the discretion, its importance is such that it is now dealt with separately.

D An *Anton Piller* order is little more than an order for accelerated discovery and interrogatories in circumstances where there is evidence that, unless such discovery and interrogatories are given and answered under immediate compulsion, the relevant documents and information may never be given at all. The prime purpose of enacting section 72 was to ensure that the granting of *Anton Piller* relief would not be frustrated by defendants' claims to the protection of the privilege against self-E incrimination. This purpose has been achieved by giving such defendants a different form of protection, a more sophisticated one and a more precisely calculated one. Section 72, in withdrawing the privilege against self-incrimination without preventing evidence from being admissible in perjury and contempt proceedings, quite clearly contemplates that orders may be made forcing a party to give evidence that will be used against him in subsequent perjury or contempt proceedings. It is clear that this F was Parliament's intention, and the policy behind it is sound. Unless there are compelling reasons not to give leave, therefore, it should be given.

The present appellants argued in the Court of Appeal that to give the plaintiffs the leave sought would be to grant discovery in aid of contempt proceedings. The plaintiffs answer this in two ways. First, it is G incorrect on the facts of the present case. The 1985 order was an order for early discovery in the 1985 action. It was not an order applied for or granted with a view to facilitating contempt proceedings. From the point of view of the plaintiffs it was adventitious that evidence of contempt was disclosed. Having obtained that evidence (which should have been obtained on discovery in the ordinary way in the 1985 action had the 1985 order not been made), the plaintiffs are asking the court to H exercise its discretion to permit use of that evidence. There is a fundamental difference between an application for discovery in aid of contempt or perjury proceedings and an application for discovery in a civil lis which adventitiously reveals contempt or perjury. Secondly,

although on the facts of the present case it is unnecessary for the plaintiffs to contend this, the argument is in any event misconceived. The reason why a court would formerly have refused to make an order the effect of which might be to compel discovery for use in subsequent contempt proceedings was the privilege against self-incrimination. Section 72, however, has removed the privilege in respect of documents or answers that reveal infringement of a plaintiff's intellectual property rights in breach of an injunction restraining infringement and hence contempt of court. With this in mind it can be seen why Nourse L.J. in the Court of Appeal said (ante, p. 838H) that the appellants' argument "might well have prevailed, had it not been for section 72 . . .": had it not been, in other words, for the withdrawal of the privilege that was the foundation for the argument.

To summarise the plaintiffs' submissions on section 72: 1. section 72(1) removed the appellants' privilege (if any) in the 1985 action from complying with the 1985 *Anton Piller* order on the ground of exposure to proceedings for related offences/penalties. In any event, no objection was taken at that time. 2. The 1985 order was not obtained in aid of contempt proceedings, and all documents produced in compliance with the order became admissible in those proceedings for any purpose including contempt proceedings, and in other proceedings with the leave of the court. 3. Had the 1985 order been obtained in aid of contempt proceedings, the appellants would have had no privilege to decline to answer or comply if the contempt was a related offence/penalty because proceedings for contempt form part of proceedings within subsection (2). 4. Related offences/penalties can include contempt as is plain from subsection (4) and from the breadth of the definitions in subsection (5). (As to subsection (5), see *Universal City Studios Inc. v. Hubbard* [1984] Ch. 225, 235.) 5. The facts relied on in the 1985 action reveal potential contempts and hence related offences/penalties. 6. (a) In subsection (3), "statement or admission made by a person . . . in complying with any order" must be construed broadly so as to include any statement or admission by that person contained in a document disclosed in compliance with the order. (b) "Statement or admission" in subsection (4) must be given the same construction as in subsection (3). 7. Nothing in section 72 removes the implied undertaking on discovery, but subsection (4), in providing that statements and admissions (and documents containing such statements and admissions) obtained as a result of the operation of subsection (1) should not be inadmissible in contempt proceedings, gives a clear indication that Parliament intended that in contempt proceedings such evidence should be admissible and available for use and that any implied undertaking should be released. Nothing is to be done to undermine the integrity of the court's own orders.

As to the scope of the 1985 order, the appellants argue in their petition that it was of too great a scope and ought not to have been made. It is now too late to raise this argument, for Whitford J. has exercised his discretion to order the discovery sought by the plaintiffs and the appellants have not sought to challenge his order. Nevertheless, in so far as it may be relevant to the exercise of discretion on the implied undertaking, it is in any event not well-founded. The appellants'

A complaints appear to be two-fold: (a) that the 1985 order ought not to have overlapped with the 1984 order: and (b) that in any event it was too wide. The first complaint is that the 1985 order should not have covered the 60 scheduled house types included in the 1984 order. This amounts either to a reiteration of the argument that the effect of the order was wrongly to grant discovery in aid of contempt proceedings (which has already been dealt with) or to the argument that one can B never have discovery on the same subject matter that arises in different actions between the same parties. The latter contention needs only to be stated to be seen to be unsustainable. In the present case (the 1985 action), the appellants might consistently with having given full and frank discovery in the 1984 action have subsequently come into possession of, and copied, the plaintiffs' drawings. As to width, it is C common practice for relief in the *Anton Piller* form to be granted in respect of large numbers of copyright works. This is particularly true in audio and video piracy cases. It appears that the order in the *Rank* case [1982] A.C. 380 is an example. If it were otherwise (if relief were restricted to, say, those works in respect of which the applicant already had evidence of infringement), the purpose of *Anton Piller* orders, namely to preserve evidence that might be destroyed if the defendant D were given notice of the application, would be largely nullified. Although further evidence of a single infringement might be preserved, those executing the order might see evidence of other infringements that they would be powerless to do anything about. In the present case, it was particularly necessary that evidence of infringement be obtained as promptly as possible, since section 17(4) of the Copyright Act 1956 E provides that in an action for infringement of copyright in respect of the construction of a building no injunction is available to prevent the building from being completed once begun or to require that it be demolished. Any interlocutory injunction, therefore, had to be obtained before construction was commenced.

The real issue in the present appeal is whether the Court of Appeal exercised its discretion correctly. It is for the appellants to show that it F erred on normal principles. Not only did it not err, however; it was clearly correct. The plaintiffs rely, as they did below, on the following factors, in addition to those already outlined, as relevant to the exercise of discretion. (1) The public interest that orders of and undertakings given to the court should not be flouted: see *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97, 109. (2) The G rationale of the rule in *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881 as expressed by Stephenson L.J., at p. 902F (see also p. 903), was that "the court has and should generally use the power to protect parties who make full and frank disclosure of documents . . ." The appellants do not fall into the category of persons which the rule is intended to protect. (3) In the same case, Waller L.J. said, at p. 912B: "The interests of the proper administration of justice require that there should be no H disincentive to full and frank discovery." There could be no greater disincentive to full and frank discovery than if it is known by litigants that there are circumstances in which they can with impunity refuse to obey court orders as to discovery. (4) This is not a case of a litigant

wanting to communicate the substance of a document to a third party (as in *Alterskye v. Scott* [1948] 1 All E.R. 469), nor of a disposal to a newspaper (as in *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.* [1975] Q.B. 613), nor of a desired use of the document to *found* a different cause of action (*Riddick*; *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc.* (unreported), 6 February 1986; Court of Appeal (Civil Division) Transcript No. 117 of 1986) but a case where a litigant seeks to promote and not to undermine the public policy of achieving justice between the parties before the court. (5) The documents in question are not exclusively the private documents of the appellants; they are all either photocopies of or derived from the plaintiff's documents. (6) One reason for the rule in *Riddick* as expressed by Megaw L.J. in *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97, 121 was that "documents belonging to a party are their own property." The same cannot be said of any document that is an infringing copy of another's document, as the documents in question are here. Section 18 of the Act of 1956 gives the copyright owner proprietary remedies in respect of such documents. (7) The 1985 action was only started as a separate action because the events to which it relates might have commenced after the issue of the writ in the 1984 action. The parties and the cause of action are substantially the same. (8) There is no special reason not to exercise the discretion in the plaintiffs' favour. The only substantial reason relied on by the appellants is that the disclosure of the documents pursuant to the 1985 order was made under compulsion. As has already been pointed out, however, this simply amounts to relying on the privilege, which has been withdrawn.

If and in so far as it is contended by the appellants that Whitford J. was correct in holding that only when contempt proceedings have been commenced should the plaintiffs make an application for release from their implied undertaking, this is erroneous or would give rise to undesirable practice. It is erroneous because the plaintiffs' advisers would have to make use of the documents to formulate with the necessary precision the case against the alleged contemnors. Even if not prohibited by the undertaking, this would be undesirable because it is better by far that solicitors should seek the guidance of the court as to the extent of their obligations to it rather than presume that their proposed conduct falls just outside the ambit of their undertaking. Nor could the drafting of non-specific general allegations of contempt meet the requirements of justice.

There is a difference between a party trying to obtain documents for a purpose for which he is not entitled to them and using documents that have come properly into his possession.

There is a very important distinction between release from the undertaking for the separate use of the documents in an entirely distinct action by a third party and the position where, particularly in the case of a contempt, the court will continue to control the use of those documents.

It is accepted that the party accused of contempt is innocent until proved guilty; yet a court should be alert to consider whether there is

A evidence worthy of investigation of a breach of its orders. Here, there is such evidence.

As to practice and procedure, what Lord Keith of Kinkel said in *Home Office v. Harman* [1983] 1 A.C. 280, 309G covers the problem faced by the plaintiffs. There is no real impasse.

This is not a case of a private right. There is a need for justice both to the parties and to the public.

B *Morritt Q.C.* in reply referred to *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (No. 1 and No. 2)* [1978] A.C. 547.

Their Lordships took time for consideration.

C 9 July. Lord Keith of Kinkel. My Lords, I have had the opportunity of reading in draft the speech to be delivered by my noble and learned friend Lord Oliver of Aylmerton. I agree with it, and for the reasons he gives would dismiss the appeal.

Lord Templeman. My Lords, for the reasons to be given by my noble and learned friend Lord Oliver of Aylmerton I would dismiss this D appeal.

Lord Griffiths. My Lords, I have had the advantage of reading in draft the speech to be given by my noble and learned friend Lord Oliver of Aylmerton. I agree with it, and for the reasons he gives I too would dismiss this appeal.

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Lord Mackay of Clashfern. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Oliver of Aylmerton and for the reasons he gives I too would dismiss this appeal.

F Lord Oliver of Aylmerton. My Lords, the respondents, Crest Homes Ltd. ("Crest"), are a company carrying on, either themselves or through subsidiary companies, a business of developing and selling land for residential purposes. In the course of that business they have evolved a substantial number of designs and plans of different types of dwelling house and it is not in dispute that they are the owners of the copyright in those designs and plans. On 23 November 1984 Crest, together with G its subsidiary company Crest Homes (Westerham) Ltd. ("Westerham"), obtained from Scott J. ex parte an order in the *Anton Piller* form (*Anton Piller KG v. Manufacturing Processes Ltd.* [1976] Ch. 55) against the first and second appellants. The first appellant was an employee of Crest and a director of Westerham but had handed in his resignation and left to join the second appellant, a company incorporated in the previous August, as its managing director. The basis of the ex parte H application was an allegation that Crest had discovered that a planning application had been made by the second appellant using drawings relating to two of Crest's house designs known as "Carrington" and "Linslade." The order, which followed the usual *Anton Piller* form,

incorporated an undertaking by the plaintiffs to issue and serve a writ and notice of motion and that was done on 26 November 1984. The defendants were the first two appellants and another individual not a party to this appeal. Subsequently further parties were added by amendment. The writ claimed appropriate injunctions restraining infringement of Crest's copyright in the drawings relating to their house designs and misuse of confidential information, an inquiry as to damages and delivery up of infringing material. I will refer to the action thus constituted as "the 1984 action." The order of Scott J. ("the 1984 order") restrained the defendants in the action from parting with possession otherwise than to the plaintiffs' solicitors of an extensive range of documents including "any documents of the plaintiffs or either of them relating to any of their house designs listed on page 2 of exhibit JMC 11" to the affidavit sworn in support of the application and it obliged the first appellant to permit entry to his house for the purpose of searching for, inspecting and removing such documents. The exhibit referred to contained particulars of 60 of Crest's house designs including the Carrington and Linslade designs which had formed the basis of the application. That order was duly executed at the first appellant's house and a number of documents were inspected and removed into the custody of Crest's solicitors. On the first inter partes hearing of the motion before Vinelott J. on 4 December 1984 the matter was adjourned to a date to be fixed on an undertaking substantially in accordance with the injunction granted by Scott J. On 11 December 1984 the first appellant swore an affidavit in which he accepted that the second appellant had made use of drawings relating to the Carrington and Linslade houses and swore that he had no relevant documents in his possession other than those which had been found as a result of the search of his premises on the execution of the order, which documents had been listed in an exhibit to an affidavit of Crest's solicitor. He had previously, pursuant to the order, sworn an affidavit on 30 November 1984 denying that he was in possession of any of the documents or information required by the order. The action thereafter proceeded on the footing that only the Carrington and Linslade designs had been copied and that the first appellant was not in possession of any further documents relating to Crest's designs. On the adjourned hearing of the motion on 17 April 1985 a further undertaking in the terms of the previous undertaking with certain modifications was given and the motion stood to trial.

As already mentioned, the 1984 order and the undertakings which replaced it related to 60 specified Crest designs. They did not include the design of a house type known as "Versailles." In October 1985, however, Crest discovered that the second appellants were advertising a house which appeared to them to be similar to the Versailles house and, after inspecting the second appellant's planning applications, they concluded that the design was substantially copied from their Versailles design. The relief claimed in the 1984 action was sufficiently wide to cover a claim in respect of such copying and it would, no doubt, have been open to Crest to apply in that action for a further interlocutory injunction specifically to restrain copying of the Versailles design and

A any other Crest designs not already embraced in the existing undertakings. It seems, however, that they took the view that any infringement in relation to the Versailles design would probably have taken place after the commencement of the 1984 action and would thus constitute a fresh cause of action. They accordingly, on 25 November 1985, commenced a second action against the first and second appellants claiming substantially the same relief as that claimed in the 1984 action and at the same time B they obtained and executed a fresh *Anton Piller* order ("the 1985 order") directed to conducting a search at the second appellant's business premises for documents which included the designs listed in an exhibit to the affidavit in support of the application. This exhibit listed some 105 designs and included (although, it might then have been thought, unnecessarily) the 60 already the subject matter of the existing C undertaking. That order was duly executed. No objection was made to the search and numerous drawings were discovered which Crest allege infringe their copyright and which include drawings which Crest allege are copies of designs of some of the 60 types of dwellings specifically made the subject matter of the 1984 order. Crest concluded, therefore, that the existing undertakings had been broken and that the first and second appellants were in breach of the 1984 order. In an affidavit D sworn on 17 December 1985 the first appellant admitted that all these documents had been in his possession at the time of the 1984 order but deposed that a representative of Crest's solicitors had consented to his retaining them.

In the light of this history, and if Crest are right in believing that the documents disclosed as a result of the execution of the 1985 order show E numerous (and, it must be assumed, deliberate) breaches of the order and undertakings made or given in the 1984 action—and it must be emphasised that this is very much at issue—it is not altogether surprising that they now wish to seek to enforce the order and undertakings by proceedings in the 1984 action for contempt of court. The problem with which they are confronted, however, is that a substantial part of the material which they would require to make use of in prosecuting such an F application consists of the documents taken into the possession of their solicitors and the affidavits sworn by or on behalf of the appellants pursuant to the 1985 order.

The purpose of an *Anton Piller* order is, primarily, the preservation of evidence which might otherwise be removed, destroyed or concealed but it operates, of course, also as an order for discovery in advance of G pleadings. It is clearly established and has recently been affirmed in this House that a solicitor who, in the course of discovery in an action, obtains possession of copies of documents belonging to his client's adversary gives an implied undertaking to the court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of his client: see *Home Office v. Harman* [1983] 1 A.C. 280. It must not be used for any "collateral or H ulterior" purpose, to use the words of Jenkins J. in *Alterskye v. Scott* [1948] 1 All E.R. 469, approved and adopted by Lord Diplock in *Harman*'s case, at p. 302. Thus, for instance, to use a document obtained on discovery in one action as the foundation for a claim in a

different and wholly unrelated proceeding would be a clear breach of the implied undertaking: see *Riddick v. Thames Board Mills Ltd.* [1977] Q.B. 881. It has recently been held by Scott J. in *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299—and this must, in my judgment, clearly be right—that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind. But the implied undertaking is one which is given to the court ordering discovery and it is clear and is not disputed by the appellants that it can, in appropriate circumstances, be released or modified by the court.

On 24 January 1986, therefore, Crest served notice of motion in the 1985 action on, inter alios, the first and second appellants seeking, so far as might be necessary, orders for the release of the implied undertaking given on the obtaining of the 1985 order to the extent necessary to enable them (a) to use the documents removed into their solicitor's custody pursuant to that order for the conduct of the 1984 action and (b) to use those documents

> "for the purpose of considering, and if so advised, preparing, commencing and conducting proceedings in connection with breaches of orders made against and undertakings given by"

the first and second appellants in the 1984 action. I say "inter alios" because after the execution of the 1985 order two further defendants were added in the 1985 action, that is to say a Mr. Best, who is not concerned in this appeal, and the third appellant, Wiseoak Residential Ltd., a company which, it appears, is also concerned in the development to which some of the drawings relate.

The motion was heard on 28 February 1986 by Whitford J. who refused the orders sought. In relation to the use of the documents in the general conduct of the 1984 action his ground for refusing an order was that, in so far as they were relevant to that action, they would in any event have to be disclosed on discovery and any deficiency in discovery in that action could be pursued at that stage. That, however, is no longer a live issue, for it was subsequently agreed by the parties at the hearing in the Court of Appeal that, without prejudice to the position as regards proceedings for contempt, no objection would be taken to the use of the documents in the general conduct of the 1984 action. That was obviously sensible because, prior to the hearing of the appeal, the master had given directions that the actions should be listed consecutively and come on for hearing at the same time. As regards the question of the use of the documents for the purposes of proceedings for contempt, Whitford J. rejected Crest's claim on the ground that it was premature until contempt proceedings had been instituted by an appropriate notice of motion. From this decision Crest appealed to the Court of Appeal which allowed the appeal and made an order on 20 February 1987 that Crest be at liberty to use the documents removed under the 1985 order and three specified affidavits sworn in the 1985 action pursuant to the *Anton Piller* order for the purposes specified in the notice of motion. That order was subsequently stayed pending the hearing of a petition for

leave to appeal to your Lordships' House, which leave was subsequently granted on 19 March 1987.

In the Court of Appeal the leading judgment was given by Nourse L.J. who, after reviewing the arguments for and against releasing Crest's solicitors from the implied undertaking, was prepared to assume that the arguments against such release ought to prevail were it not for the provisions of section 72 of the Supreme Court Act 1981 which, in his view, was the determinative factor in pointing to the conclusion that the appeal should be allowed. My Lords, I have, speaking for myself, found some difficulty in following the reasoning of the Court of Appeal in this respect. I cannot, for my part, regard section 72 as having anything but a peripheral significance in the solution of the problem with which your Lordships are faced. It is a section which was passed in order to meet the difficulty caused by the fact that the *Anton Piller* order is most frequently made in cases concerned with the infringement of intellectual property rights. The circumstances in which such infringements take place very frequently involve the commission of a criminal offence or subject the defendant to statutory penalties. They may involve a criminal conspiracy. Where they do, apart from the section, this enables the defendant to claim that the privilege against self-incrimination entitles him to have any order for discovery or production set aside, a claim which was upheld in this House in *Rank Film Distributors Ltd. v. Video Information Centre* [1982] A.C. 380. In order to meet that situation the section deprives the defendant, in proceedings to which it relates, of his right to a claim to be excused from answering questions or complying with an order of the court on the grounds that the answers or compliance might expose him to proceedings of a penal nature and, as a quid pro quo, safeguards his position by providing that no statement made or answer given shall be admissible as evidence in such proceedings. The section, however, expressly excludes from the proceedings in which such statements are to be inadmissible proceedings for perjury or contempt of court. The side-note to the section is "Withdrawal of privilege against incrimination of self or spouse in certain proceedings" and section 72 is, so far as material, in the following terms:

> "(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person . . . to proceedings for a related offence or for the recovery of a related penalty—(*a*) from answering any question put to that person in the first-mentioned proceedings; or (*b*) from complying with any order made in those proceedings. (2) Subsection (1) applies to the following civil proceedings in the High Court, namely—(*a*) proceedings for infringement of rights pertaining to any intellectual property or for passing off; (*b*) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off; and (*c*) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off. (3) Subject to subsection (4), no statement or admission made by a person—(*a*) in answering a question put to him in any proceedings to which subsection (1) applies; or (*b*) in complying with any order made in any such proceedings, shall, in proceedings

for any related offence or for the recovery of any related penalty, be admissible in evidence against that person . . . (4) Nothing in subsection (3) shall render any statement or admission made by a person as there mentioned inadmissible in evidence against that person in proceedings for perjury or contempt of court."

Subsection (5) contains a number of definitions. For present purposes I need only to refer to the definition of "related offence" which is in these terms:

> " 'related offence,' in relation to any proceedings to which subsection (1) applies, means—(*a*) in the case of proceedings within subsection (2)(*a*) or (*b*)—(i) any offence committed by or in the course of the infringement or passing off to which those proceedings relate; or (ii) any offence not within sub-paragraph (i) committed in connection with that infringement or passing off, being an offence involving fraud or dishonesty; (*b*) in the case of proceedings within subsection (2)(*c*), any offence revealed by the facts on which the plaintiff relies in those proceedings; . . ."

My Lords, I confess that I have found the section far from easy to construe. This much is clear, that the privilege against self-incrimination is withdrawn only so far as the answer or compliance with the order would expose the defendant to proceedings for a "related offence"—I leave aside penalties which must, I think, clearly refer to statutory penalties and have no relevance in the context of the instant case. Secondly, to be a related offence, the offence must be one which is committed by the very act of infringement complained of or one committed in the course of carrying out that infringement or it must be an offence involving fraud or dishonesty which is committed in connection with the infringement complained of or an offence revealed by the facts on which the plaintiff relies in the proceedings. The difficulty arises in relation to subsection (4). "Offence" hardly seems an appropriate word to describe a civil contempt but the assumption seems to be that the perjury or contempt referred to must be a related offence, for otherwise subsection (3) could not in any event have affected the admissibility of the statement or admission. At the same time, it is not easy to envisage how a contempt of court could be committed in carrying out the very infringement of which complaint is made in the proceedings save where, as is alleged here, the proceedings relate to an infringement constituting a breach of an order in some other proceedings—a circumstance which must be so rare that it can hardly have been in the draftsman's contemplation. Equally it is not easy to see how it can be "revealed by" the facts on which the plaintiff relies in the proceedings, although one can readily see that the contempt itself, when committed, may be a fact which the plaintiff will seek to rely upon at the trial in support of his claim for quia timet relief. The probability is, as it seems to me, that the subsection was inserted out of an abundance of caution in order to forestall any possible argument that subsection (3) afforded any protection in cases of contempt of court or perjury whether or not they could be brought under the umbrella of "related offences." But whether that is so or not, in so far as the contempt or perjury is a related offence

subsection (1) clearly destroys any claim to privilege on the ground of self-incrimination. Equally clearly the admissibility in evidence in proceedings for contempt of statements or admissions remains unaffected by the section. Moreover while subsection (1) destroys any claim to privilege in relation to compliance with the order, whether by making statements or answering questions or by permitting entry, search and removal, subsection (3) is confined to the admissibility of a "statement or admission" and confers no protection in relation to the admissibility in evidence of documents or material removed into custody under the order. Having said that, however, I have not for my part been able to attach to the section the critical importance which appears to have been attached to it by the Court of Appeal as a factor to be taken into account in determining whether the undertaking should be released to the extent sought by Crest. In so far as a possible contempt of court in the 1984 action is an offence related to the infringements complained of in the 1985 action the section effectively precluded any objection being taken to the 1985 order on the ground of possible self-incrimination. Beyond that it did no more than preserve the admissibility in evidence of statements and admissions which, once made, would in any event have been admissible. At highest it can be said only to demonstrate an intention on the part of the legislature that the quid pro quo for the removal of the privilege which might otherwise have prevented the evidence being given should not extend to proceedings for contempt. For my part, therefore, I derive little assistance from this section.

Was, then, the Court of Appeal right in reversing the decision of Whitford J. and making the order of 20 February 1987? The refusal of the leave sought at first instance on the ground of prematurity cannot, I think, have been right for it involved the consequence that no use could be made of the documents without a prior notice of motion in a case where, if Crest were right, no notice of motion could have been prepared without using the documents. Mr. Morritt, however, on behalf of the corporate appellants, has rightly drawn attention to the importance, stressed in *Home Office v. Harman* [1983] 1 A.C. 280, of preserving the implied undertaking. It should not be relaxed, it is said, as a matter of public policy, for otherwise litigants may be deterred from making full and frank disclosure. Additionally it is submitted that in substance Crest's application is one for discovery in aid of a contemplated motion for contempt which ought not to be permitted and reference is made to the decision of the Court of Appeal in *A. J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923. If, it is said, Crest had applied in the 1984 action for discovery of documents in aid of a motion for contempt, the application would have been refused because the court will not order a defendant to discover documents for the purpose of incriminating him. It would not, therefore, it is argued, be right to produce by a relaxation of the undertaking in the 1985 action a result which could not have been produced by an application in the action in which the alleged contempt occurred.

My Lords, I would not wish anything said in your Lordships' House to be thought to detract from the integrity of the implied undertaking given to the court on behalf of a party obtaining an order for discovery.

Nevertheless, in the very special circumstances of this case, I find myself unimpressed by the arguments adduced on behalf of the appellants. So far as concerns the effect of a relaxation of the undertaking upon the performance of the obligation to make full and frank disclosure, there are two points. In the first place, that obligation can be of little relevance in relation to the seizure of documents and materials under an *Anton Piller* order, the whole purpose of which is to gain possession of material evidence without giving the defendant the opportunity of considering whether or not he shall make any disclosure at all. Indeed the justification for the application is the likelihood that, short of immediate and unheralded intervention, relevant material is likely to be spirited away or destroyed. Secondly, so far as concerns free and frank disclosure under the compulsion of that part of the order which requires the defendant to swear an affidavit, the point may have some general validity but in a case where, if Crest are right, the absence of free and frank disclosure on a previous occasion is manifest, an appeal to it has a somewhat hollow ring.

As regards the suggestion that to release the undertaking now would, in effect, be to deprive the appellants of an opportunity which they would otherwise have had, had the application been made in the 1984 action, to resist disclosure and production of the material sought on the ground that discovery was being required in aid of contempt proceedings and would thus involve self-incrimination, this is, in my judgment, misconceived. The 1985 order, if it had been applied for in the 1984 action, could perfectly properly have been made in that action. It is true that in *A. J. Bekhor & Co. Ltd. v. Bilton* the Court of Appeal held that an order for discovery in aid of a *Mareva* injunction (*Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509) ought not to be made for the purpose, not of discovering the whereabouts of assets, but of ascertaining whether there had been past breaches of the injunction. But that is a long way removed from the instant case, where the application was directed simply to the preservation of evidence in relation to infringing material not covered by the existing undertakings and it is purely adventitious that it happens (assuming always that Crest are right in what they allege) incidentally to have uncovered evidence of breaches of those undertakings. On the execution of the 1985 order the appellants were advised of their right to seek legal advice before compliance and they availed themselves of it. If, of course, the contempt alleged by Crest was a "related offence," they had no privilege to plead; but if they took the view that any breaches of the undertakings which might have been exposed were not "related offences," it was open to them, if they wished, to seek to discharge the order or to take an objection on the ground of self-incrimination when they came to swear affidavits in compliance with the order. They did not do so and there is no question but that the evidence of which Crest now seek to make use was perfectly properly obtained. It is clearly established that although a contemnor is not a compellable witness in proceedings against him for contempt, if he gives evidence he can be cross-examined upon it in relation to the contempt alleged: *Comet Products U.K. Ltd. v.*

Hawkex Plastics Ltd. [1971] 2 Q.B. 67. I cannot, therefore, for my part, agree that, simply because the application which produced the evidence was made in the 1985 action, the release of the undertaking which is now sought will deprive the appellants of some protection which would have been available to them if it had been made in the action in which it is now sought to move for contempt. The material which, it is claimed, has been uncovered would clearly have been discoverable on general discovery in that action so far as it related to the 60 house types covered by the 1984 order, although it may well be that an application for discovery of that material specifically for the purpose of supporting a motion for contempt would have been unsuccessful. Thus much, if not all, of the material covered by the implied undertaking in the 1985 action would in any event have had to have been made available in the 1984 action although possibly at a later stage. It is said that on general discovery in the 1984 action the appellants would, so far as they were able to demonstrate that any contempt committed was not a "related offence," have been able to resist disclosure by pleading the privilege against self-incrimination. That may be right, although if it is it produces the extraordinary result that a defendant, by putting himself in contempt of court, can successfully resist discovery of relevant documents at any stage of the proceedings. Thus logically a defendant who, in response to an order for verification of his list of documents by affidavit, makes inadequate discovery can thereafter resist any application for discovery of particular documents on the ground that to comply would demonstrate that he had been in breach of the earlier order and thus in contempt. I cannot think that that can be right, but it is unnecessary to decide the point since such an objection, if open at all, would have been equally open on the execution of the 1985 order and was not taken. I can, therefore, in the circumstances of this case, discern no injustice to the appellants if the documents are made available for use in the 1984 action. Should the point arise for decision it may be necessary in relation to the production of relevant documents essential to the conduct of proceedings—I say nothing about interrogatories—to reconsider the extent of the privilege against self-incrimination where it is prayed in aid solely on the ground of liability to a motion for civil contempt in those proceedings.

My Lords, although I have, for my part, found the appellants' arguments less than convincing, they can and do fairly say that it is not for them to advance reasons why the implied undertaking should not be released but rather for the respondents to demonstrate cogent and persuasive reasons why it should be released. To that I now turn. Mr. Henderson, on behalf of the respondents, whilst accepting the importance, as a matter of general policy, of preserving the integrity of undertakings given to the court as the price of discovery, submits that there is an equally important countervailing consideration of public policy that orders of the court should be obeyed. I accept that, but if what was in issue here was the revelation of a civil contempt in some wholly unrelated proceeding I would not for my part consider that the importance of ensuring obedience to the court's orders outweighed that

of ensuring the continued observance of an undertaking given to the court by the party obtaining discovery. Your Lordships have been referred to a number of reported cases in which application has been made for the use of documents obtained under *Anton Piller* orders or on general discovery for the purpose of proceedings other than those in which the order was made. Examples were *Halcon International Inc. v. Shell Transport and Trading Co.* [1979] R.P.C. 97 and *Sybron Corporation v. Barclays Bank Plc.* [1985] Ch. 299. I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse L.J. observed in the course of his judgment in the instant case (ante, p.840G), each case must turn on its own individual facts. In the instant case, the determinative point to my mind is that it is purely adventitious that there happened to be two actions. That has been brought about partly by purely technical considerations and partly, as Crest allege, by the appellants' failure to make full and frank disclosure under the 1984 order, and the fact that the parties to the two actions are not identical is quite immaterial. The cause of action is the same in each and the first and second appellants are defendants in both. The remaining defendants could equally well have been joined as defendants in a single set of proceedings. Thus it is a pure technicality that the 1985 order happens to have been made in proceedings other than those in which Crest seek to move to enforce the undertakings. It has been submitted that proceedings for contempt of court are always to be regarded, for the purpose of the implied undertaking on discovery, as "collateral" to the action in which they are launched, so that even if the 1985 order had been made in the 1984 action it would still have been necessary to seek the leave of the court to use the material thus discovered for the purposes of the motion for contempt in that action. My Lords, I find myself quite unable to accept that submission. The proper policing and enforcement or observance of orders made and undertakings given to the court in an action are, in my judgment, as much an integral part of the action as any other step taken by a plaintiff in the proper prosecution of his claim. The normal procedure where the contempt complained of is that of a party to the action is to apply for committal by motion in that action as an incidental step in the action. There is, in my judgment, nothing "collateral" or "alien" about enforcement of the court's order in the action in which discovery is obtained and I do not entertain any doubt at all that documents disclosed on discovery in the action can perfectly properly be used for the purpose of taking such a step without in any way infringing the implied undertaking and without the necessity of obtaining the prior leave of the court.

The evidence in the instant case discloses that there is, to put it no higher, at least a serious question to be investigated as to whether there has not been a deliberate contempt by flouting the court's orders and breaking undertakings freely given to the court in the 1984 action. In substance the 1984 action and the 1985 action are a single set of

proceedings—a circumstance emphasised by the order that the two should be heard together—and the fact that, because, for reasons good or bad, Crest's claim has been prosecuted by the issue of two writs instead of one, the court's leave is required for the use of the documents obtained under the 1985 order is the merest technicality. To accede to Crest's application will, in these circumstances, cause no injustice to the appellants nor will it detract from the solemnity and importance of the implied undertaking. Although, therefore, I have not felt able to agree fully with the reasoning of the Court of Appeal so far as it was based upon section 72 of the Act of 1981, I have been left in no doubt that the conclusion at which that court arrived was correct. I would accordingly dismiss the appeal.

Appeals dismissed with costs.

Solicitors: Jaques & Lewis; Stoffel & Co.; Lovell White & King.

M. G.

[HOUSE OF LORDS]

SIMPSON . . . . . APPELLANT

AND

THE LAW SOCIETY . . . . . RESPONDENT

1987 March 31, April 1; May 20

Lord Bridge of Harwich, Lord Brightman, Lord Templeman, Lord Oliver of Aylmerton and Lord Goff of Chieveley

Legal Aid—Costs—Charge on property—Divorce—Property adjustment order—Legally aided wife receiving lump sum payment on sale of matrimonial home—Whether legal aid fund's costs payable forthwith—Whether discretion in Law Society to defer payment—Whether statutory charge transferable to new property to be acquired with lump sum—Legal Aid Act 1974 (c. 4), s. 9(6)—Legal Aid (General) Regulations 1980 (S.I. 1980 No. 1894), regs. 88, 91(1)(2), 93(b)

In matrimonial proceedings in which the wife was legally aided, the judge made an order that the former matrimonial home, which was jointly owned, should be sold and that the wife should receive £30,000 out of the proceeds of sale. The net proceeds amounted to £33,431 of which half belonged to the wife absolutely in right of her original ownership of half of the property; the additional £13,284 to which the wife was entitled

under the order was an amount "recovered . . . in the proceedings" on which The Law Society would have a first charge under section 9(6) of the Legal Aid Act 1974[1] for the benefit of the legal aid fund (subject to an exemption in respect of the first £2,500 in accordance with regulation 96(*d*) of the Legal Aid (General) Regulations 1980[2]) to the extent that the fund's liability exceeded the wife's contribution. The fund's liability exceeded the £10,784 which was liable to the statutory charge under section 9(6). The wife issued an originating summons seeking a declaration that The Law Society had a discretion under the Act and the Regulations to postpone the enforcement of the charge, to permit her to use the £30,000 payable to her under the order in the purchase of a new home and to agree to accept a charge on the new property in substitution for the statutory charge on the money recovered in the matrimonial proceedings. Otton J. dismissed the application and the Court of Appeal, bound by authority to the effect that The Law Society had no discretion to postpone enforcement of the statutory charge where the property recovered took the form of money, upheld his decision.

On the wife's appeal:—

Held, dismissing the appeal, that The Law Society's discretion to postpone enforcement of the statutory charge under section 9(6) of the Act of 1974 where the court had made a transfer of property order (or to transfer it to a substituted property), did not extend to an order providing for the payment of a sum of money since regulations 88, 91(1) and 93 of the Regulations of 1980 required the money to be paid to The Law Society, which, under regulation 93(*b*), had to retain sufficient money to satisfy the statutory charge before paying any balance to the assisted person; that, accordingly, The Law Society had no discretion to postpone the statutory charge on the wife's lump sum award or to allow its transfer to a substituted security (post, pp. 869B–C, 870A–B, G—871B)

Hanlon v. The Law Society [1981] A.C. 124, H.L.(E.) distinguished.

Reg. v. The Law Society, Ex parte Sexton [1984] Q.B. 360, C.A. approved.

Per curiam. An anomalous situation is created by the regulations whereby a wife to whom the husband's interest in the former matrimonial home is transferred may enjoy that property, or another purchased in substitution, subject to the charge, whereas a wife who receives a share in the proceeds of sale of the former matrimonial home may receive no more than the exempt £2,500 and may be left homeless in consequence. The regulations should be amended without delay (post, p. 870B–D, F–G).

Decision of the Court of Appeal affirmed.

The following cases are referred to in the opinion of Lord Bridge of Harwich:

Hanlon v. The Law Society [1981] A.C. 124; [1980] 2 W.L.R. 756; [1980] 2 All E.R. 199, H.L.(E.)

[1] Legal Aid Act 1974, s.9(6): see post, p. 865A–B.
[2] Legal Aid (General) Regulations 1980, reg. 88: see post, p. 868B–C.
Reg. 91(1)(2): see post, p. 868C–E.
Reg. 93: see post, p. 868E–F.

Jones v. The Law Society, The Times, 27 and 28 January 1983
Reg. v. The Law Society, Ex parte Sexton [1984] Q.B. 360; [1983] 3 W.L.R. 830; [1984] 1 All E.R. 92, C.A.
Simmons v. Simmons [1984] Fam. 17; [1983] 3 W.L.R. 818; [1984] 1 All E.R. 83, C.A.

No additional cases were cited in argument.

APPEAL from the Court of Appeal.

This was an appeal by leave of the Court of Appeal (Sir John Donaldson M.R., Nourse and Glidewell L.JJ.) from their order dated 10 July 1986 dismissing an appeal by the appellant, Marion McDonald Court Simpson, from the order of Otton J. dated 28 January 1986 dismissing her originating summons seeking declarations to the effect that the respondents, The Law Society, had a discretion to postpone the enforcement of a statutory charge for the benefit of the legal aid fund imposed by section 9(6) of the Legal Aid Act 1974 in respect of a lump sum recovered by her in matrimonial proceedings, and to allow the charge to be transferred to a house to be purchased by her.

The facts are set out in the opinion of Lord Bridge of Harwich.

Malcolm K. Lee Q.C. and *Stephen Oliver-Jones* for the appellant. The issue is whether, where an assisted person who owes money to the legal aid fund for legal aid costs recovers or preserves money in matrimonial proceedings as opposed to a house, The Law Society has a discretion to take a charge over the money for the unpaid costs and to transfer that charge to a house acquired by the assisted person with that money. *Simmons v. Simmons* [1984] Fam. 17 and *Reg. v. The Law Society, Ex parte Sexton* [1984] Q.B. 360 were wrongly decided. The distinction to be drawn between a house and funds set aside for the purchase of a house produces such anomalous, arbitrary and unfair results that if there is any doubt in the matter it should be resolved in favour of the litigant. Section 9(6) of the Legal Aid Act 1974 and regulation 97 of the Legal Aid (General) Regulations 1980 give The Law Society power and discretion to postpone the enforcement or operation of the statutory charge by transferring the charge to real property to be purchased by the assisted person as a home in substitution for the matrimonial home with the money derived from the sale of the latter. The word "property" as used in section 9(6) of the Act of 1974 includes money as well as other types or property; this is clear from section 9(8) of the Act which expressly refers to "damages." The Regulations of 1980 contain no definition of the word "property"; where the word appears in regulation 97(1) it must be used in the same sense as it is used in the statute containing the charge, and thus must include money. By reason of the mere vesting of the charge The Law Society has all the normal powers of a chargee as well as the powers of enforcement contained in regulation 97(2). An ordinary chargee has power to accept a substitute security for his charge if he chooses to do so as well as to postpone the enforcement of his charge. See *Hanlon v. The Law Society* [1981] A.C. 124, 183A–H, 184A–E, *per* Lord Simon of Glaisdale, 188A–F, *per* Lord Scarman, 202C–H, 203H and 204A–C, *per* Lord Lowry.

Duncan Matheson for The Law Society. The House in *Hanlon v. The Law Society* [1981] A.C. 124 held that The Law Society, as administrators of the legal aid fund, have the charge vested in them and that, save in so far as regulations otherwise provide, they have all the powers of a chargee. They will be constrained by various considerations but they are not confined to the narrow interests of the taxpayer. The inhibition in the present case comes from Regulations 88, 91 and 93 of the Regulations of 1980. It is accepted that the result leads to an anomaly, but they clearly prevent any discretion to postpone enforcement of the statutory charge under section 9(6) of the Act of 1974 when the "property" is money. Regulations 88, 91 and 93 are plain and unambiguous and the anomaly caused is not one that the House can remedy by writing words into the regulations. They impose a mandatory and unqualified requirement that all moneys recovered for an assisted person in any proceedings shall be paid forthwith into the legal aid fund and there retained on account of the statutory charge. In regulations 91(2) the word "thereby" can refer to nothing but the payment into the fund. If The Law Society had the wide powers with regard to money suggested by the appellants, then regulation 91(2) would be otiose. Although in *Hanlon v. The Law Society* it was held that The Law Society did in that case have a discretion to postpone enforcement of the statutory charge and to allow its transfer to a substitute security, the property recovered in that case and to which the statutory charge consequently applied was the matrimonial home itself and to that situation the predecessors of what are now regulations 88, 91(1)(*b*) and 93 had no application, those regulations being concerned only with cases where the property recovered takes the form of money—as it does in the instant case. *Hanlon* is therefore distinguishable.

Lee Q.C. replied.

Their Lordships took time for consideration.

20 May. Lord Bridge of Harwich. My Lords, the appellant was the petitioner in divorce proceedings in which her claim for ancillary relief was the subject of a long and bitter contest. She was legally aided. The respondent husband was not. The main asset in dispute was the former matrimonial home, which was jointly owned. The net equity of the parties in the house was estimated to be about £40,000. Booth J., after a hearing lasting four days, made an order dated 11 March 1982 that the house should be sold and that the appellant should receive £30,000 out of the proceeds of sale. The husband was ordered to pay three-quarters of the appellant's costs and £4,500 from the balance of the proceeds of sale was to be retained in a joint account by the parties' solicitors for the purpose of discharging that liability. The husband sought to obstruct the implementation of the order and further substantial costs were incurred in proceedings to overcome that obstruction. The husband is now bankrupt.

In the event the net proceeds of sale of the matrimonial home amounted to only £33,431.10. Half of this sum, £16,715.55, belongs to the appellant absolutely in right of her original ownership of a half share

in the property. But the balance of £13,284.45 (payable to her pursuant to the judge's order that she receive £30,000) represents property recovered for her in the proceedings in connection with which she received legal aid.

Section 9(6) of the Legal Aid Act 1974 ("the Act") provides:

> "Except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situated) which is recovered or preserved for him in the proceedings."

The "net liability" of the legal aid fund means, put shortly, the costs incurred by the fund on the assisted person's account and not recouped from the other party to the proceedings: section 9(9). Regulation 96(*d*) of the Legal Aid (General) Regulations 1980 ("the Regulations") grants an exemption from the charge created by section 9(6) of the Act in respect of the first £2,500 of any money, or of the value of any property, recovered by virtue of certain orders made under the Matrimonial Causes Act 1973. The appellant is entitled to this exemption. The effect, therefore, of these provisions is to subject £10,784.45 payable to the appellant pursuant to the judge's order to a first charge for the benefit of the legal aid fund. Unfortunately, the net liability of the fund exceeds the appellant's modest contribution by an amount substantially in excess of this sum. Accordingly, if the charge is to be presently enforced, the whole sum of £10,784.45 will be swallowed up by the legal aid fund instead of being available to the appellant, as the judge must have intended, towards the purchase of a new home for herself.

The issue in the appeal is whether The Law Society have any discretion under the Act and the Regulations to postpone the enforcement of the charge, to permit the appellant to use the full £30,000 payable to her under the order in the purchase of a new home and to agree to accept a contractual charge on the new property in substitution for the statutory charge on the money recovered in the divorce proceedings. The appellant instituted the present proceedings by originating summons seeking a declaration that The Law Society have such a discretion. It was common ground that the courts below were bound by the decisions of the Court of Appeal in *Simmons v. Simmons* [1984] Fam. 17 and *Reg. v. The Law Society, Ex parte Sexton* [1984] Q.B. 360 to dismiss the appellant's claim. They did so without hearing argument, but the Court of Appeal granted leave to appeal to your Lordships' House.

Property recovered in matrimonial proceedings by virtue of a property transfer order under section 4(*a*) of the Matrimonial Proceedings and Property Act 1970, now section 24(1)(*a*) of the Matrimonial Causes Act 1973, was originally wholly exempt from the statutory charge for the benefit of the legal aid fund under regulation 18 of the Legal Aid (General) Regulations 1971 (S.I. 1971 No. 62 (L.1)). An amendment effected by the Legal Aid (General) (Amendment No. 2) Regulations 1976 (S.I. 1976 No. 628) limited the exemption to the first £2,500 of the

value of the property. As already noted, this remains the present position. But The Law Society nevertheless continued to adopt what was described by Lord Scarman in *Hanlon v. The Law Society* [1981] A.C. 124, 188 as "the beneficently just practice of refraining from enforcing a charge on a matrimonial home so long as the spouse to whom it has been transferred remains in residence."

In *Hanlon's* case your Lordships' House had to consider whether The Law Society had a discretion to postpone the enforcement of a charge for the benefit of the legal aid fund under section 9(6) of the Act upon a former matrimonial home recovered or preserved in matrimonial proceedings and, if so, whether they had the further discretion to allow the party entitled to the property subject to the charge to sell it and to accept in substitution a charge on a replacement home, or, as it is sometimes put in the speeches, to "transfer" the charge to a new home. The House unanimously held that The Law Society had both the discretions in question.

The relevant provisions of regulation 19 of the Legal Aid (General) Regulations 1971 then in force were identical to those now appearing in regulation 97 of the present Regulations which read:

> "(1) Any charge on property recovered or preserved for an assisted person arising under section 9(6) of the Act shall vest in The Law Society. (2) The Law Society may enforce any such charge in any manner which would be available if the charge had been given inter partes."

All their Lordships thought that, in exercising their rights as chargee under paragraph (1) of this regulation, The Law Society were entitled to have regard to wider considerations than the mere interest of the legal aid fund in recouping the costs expended on an assisted person's behalf.

Lord Simon of Glaisdale [1981] A.C. 124 (correcting an obvious corruption of the text at p. 184 by reference to [1980] 2 W.L.R. 756, 802–803) said, at pp. 183-184:

> "I respectfully agree with the Court of Appeal that the respondent has a discretion as to the enforcement of the charge; but in my view it arises, not from the use of the word 'may' in paragraph (2) of regulation 19, but out of their position as chargee under paragraph (1). . . . Paragraph (1) vests the charge in the respondent, but does nothing more; paragraph (2) makes manifest the power and mode of enforcing it. By reason of the mere vesting of the charge the respondent has all the normal powers of a chargee as well as the powers of enforcement manifested by paragraph (2). . . . But I venture to think that it is too narrow to hold that the prime, if not exclusive, duty of the respondent in exercising its discretion is to the legal aid fund. Certainly the well-being of the fund is one of the matters which the respondent will weigh in the exercise of its discretion in relation to the charge. I think, however, that the duty of the respondent is rather to the whole legal aid *scheme*; and that this would not exclude consideration, among other factors, of the assisted litigant and of the purpose and result of the litigation . . ."

Lord Scarman said, at p. 188:

"The effect of regulation 19(1) is to vest the charge in The Law Society. The charge becomes its property to be managed as it thinks fit. The Law Society is, of course, a trustee: for the benefit of the charge vested in the society is to accrue to the legal aid fund. For instance, the society could not properly allow the charge to be switched to a property offering less security for the costs than the original property. But The Law Society is not merely the guardian of the fund. Its function is to secure that legal aid is available as required by the statute: section 15(1) of the Act of 1974. If, therefore, in its judgment it is able, without endangering its security, to defer the enforcement of the charge or to switch it to another property, both of which would be options open to a person owning a charge, regulation 19(1) enables it to do so—provided always that the security is not thereby endangered."

Lord Lowry said, at p. 203: "I also agree with the view of your Lordships that the society's duty is to the legal aid scheme and not just to the legal aid fund."

As a result of this decision, as Mr. Duncan Matheson for The Law Society has told us, The Law Society now never does enforce its statutory charge by exercising the power of sale of a former matrimonial home while the assisted person still occupies it as a residence. The Law Society is content to wait until the property is sold voluntarily. Moreover, guidelines have been published showing how the discretion to allow transfer of the charge to a substituted property will be exercised (see The Law Society leaflet, Civil Legal Aid: Understanding the Statutory Charge, July 1985, pp. 15–16). These show that substitution may be allowed if (1) there is sufficient equity in the second dwelling house to cover the amount of the charge; (2) the second dwelling house is to be occupied as the sole residence of the assisted person together with at least one unmarried child under 18 years of age or undergoing full time education at the date of purchase of the second dwelling house, or it is necessary for the assisted person or his or her dependants to move for reasons of health, disability or employment; and (3) it is just and reasonable to authorise the substitution and a refusal would cause hardship to the assisted person. Exceptionally a second substitution may be authorised.

If the scheme of the Act and the Regulations permit these consequences when the order of the court in matrimonial proceedings is to effect a transfer of property which leaves one spouse or the other, normally the wife, in possession of the former matrimonial home as a residence, it is submitted for the appellant that the reasoning in *Hanlon's* case must equally lead to the conclusion that where, as here, the former matrimonial home is ordered to be sold and the legally aided wife is left with nothing but an order for the payment to her of a share of the proceeds of sale with which to acquire a new home, The Law Society must have a discretion to postpone enforcement of the statutory charge on the money to be received under the order and to allow it to be used for the purchase of a new home to be substituted as security for the charge. The good sense of this proposition is undeniable. Whether the

Regulations can be construed so as to allow this sensible result to prevail is quite another matter.

It is common ground, and is clearly correct, that money is a form of property to which section 9(6) of the Act and Part XI of the Regulations, entitled "Property and costs recovered for assisted persons" apply. Thus, for example, regulation 95 deals specifically with the application of the statutory charge to moneys ordered to be paid into court and invested for the benefit of the assisted person. But the enforcement of the statutory charge in relation to an ordinary money judgment is controlled by regulations 88, 91 and 93. These provide, so far as relevant, as follows:

> "88 . . . all moneys payable to an assisted person—(*a*) by virtue of any . . . order made in connection with the action, cause or matter to which his certificate relates, . . . shall be paid . . . to the solicitor of the assisted person or, if he is no longer represented by a solicitor, to The Law Society, and only the solicitor, or, as the case may be, The Law Society, shall be capable of giving a good discharge for moneys so payable."
>
> "91(1) An assisted person's solicitor shall forthwith—. . . (*b*) subject to paragraph (2), pay all moneys received by him by virtue of an order . . . made in the assisted person's favour to The Law Society. (2) Where the appropriate area committee considers that the rights of the fund will thereby be safeguarded and so directs, the assisted person's solicitor shall—(*a*) pay to The Law Society under paragraph (1)(*b*) only such sum as, in the opinion of the appropriate area committee, should be retained by The Law Society in order to safeguard the rights of the fund under any provisions of the Act and these Regulations; and (*b*) pay any other moneys to the assisted person."
>
> "93. Upon receipt of moneys paid to them under this Part of these Regulations, The Law Society shall retain—. . . (*b*) a sum equal to the amount (if any) by which any property recovered or preserved is charged for the benefit of the fund by virtue of section 9(6) of the Act . . . and shall pay the balance to the assisted person."

The speeches in *Hanlon's* case, which reach the conclusion that The Law Society have a wide discretion to postpone enforcement and to accept a substituted security in relation to a charge on property recovered in the form of an interest in land, concentrate exclusively on the provisions now found in regulation 97(1) and (2) and make no reference to the provisions in the earlier Regulations corresponding to those I have set out above. Had they done so, they might have considered the possibility that to treat differentially The Law Society's powers in relation to a charge on property other than money and property recovered in the form of money would create a striking anomaly. What conclusion they might have reached is a matter of speculation. However, it is not suggested that it would be appropriate now to depart from the principles laid down in *Hanlon's* case. Accordingly, the question arises whether it is possible to construe the Regulations so as to avoid the striking, indeed preposterous, anomaly that The Law Society have a

A complete discretion to postpone enforcement and allow substitution in relation to a statutory charge on interests in land recovered or preserved or, indeed, chattels recovered under orders for specific delivery up, but no discretion at all to avoid the immediate enforcement of a charge on money ordered to be paid to the assisted person, even where the order is made in proceedings relating to a matrimonial home in circumstances quite indistinguishable on the merits from those considered in *Hanlon's* case.

On the face of it the language of regulations 88, 91 and 93 seems to be clear and mandatory. In the ordinary case these Regulations require three steps to be taken:

(1) The money payable to the assisted person under court order must be paid to his solicitor: regulation 88(*a*)

(2) The solicitor must pay it to The Law Society: regulation 91(1).

(3) The Law Society must retain an amount sufficient to satisfy the statutory charge: regulation 93(*b*).

Only after these steps have been taken may the balance be paid to the assisted person under regulation 93.

Understandably, Mr. Malcolm Lee, for the appellant, has concentrated his argument on regulation 91(2), which qualifies the requirement imposed by regulation 91(1) that the solicitor must pay the whole amount recovered to The Law Society. An agreement to accept as substituted security a charge on a new dwelling house to be acquired with the money recovered under court order will suffice "to safeguard the rights of the fund under any provisions of the Act and these Regulations." Accordingly, Mr. Lee submits, regulation 91(2) may be construed to allow The Law Society to agree to such a substitution. But, as Waller L.J. pointed out in *Reg. v. The Law Society, Ex parte Sexton* [1984] Q.B. 360, 366-367, the key word in regulation 91(2) is "thereby" and the only safeguard contemplated by the words "only such sum . . . should be retained" is the retention of a sum less than the whole amount recovered on behalf of the assisted person, but sufficient to cover the anticipated difference between the amount of any contribution paid by the assisted person and the net liability of the fund on his account. In practice this provision, your Lordships were told, operates, in the case of substantial money judgments, by The Law Society obtaining an undertaking from the assisted person's solicitor that his bill for legal aid costs will not exceed a given figure and permitting him to release the balance to the assisted person.

The conclusion is irresistible that the language of regulation 91(2) is incapable of yielding the meaning for which Mr. Lee contends unless some additional words are to be implied. Mr. Lee did not feel able to formulate the terms of any suggested implication. Short of rewriting the paragraph, I do not think it can be done. But even if the language of regulation 91(2) could somehow be read as giving to The Law Society a discretion to allow the assisted person's solicitor to release the money to the assisted person in exchange for a charge on a new dwelling house to be purchased with it, this would only resolve one anomaly at the expense of introducing another. For it will be observed that under regulation 88, where, at the time when money is to be paid to an

assisted person pursuant to an order of the court, the assisted person is no longer represented by a solicitor, the money must be paid direct to The Law Society. In this case regulation 91 never has any application. The Law Society on receipt of the money must deal with it as the unambiguous terms of regulation 93(*b*) require. This compels the conclusion, however unwelcome, that The Law Society has no discretion to postpone the enforcement of the statutory charge on money recovered by an assisted person or to allow its transfer to a substituted security.

To find that the law treats so differently two legally aided wives who emerge from a dispute about the matrimonial home in essentially parallel situations is surely grotesque. The wife to whom the husband's interest in the former matrimonial home is transferred may enjoy that property, or another more suitable home purchased in substitution for it, subject to a charge on which no interest is payable and which may never be enforced during her lifetime. The wife who recovers from the husband a share in the proceeds of sale of the former matrimonial home may receive no more than the exempt £2,500 and may be left homeless in consequence. If there were any way of avoiding the anomaly, I would seize it. But the language of the Regulations is too clear to admit of any remedy which lies within the range of legitimate judicial interpretation. Only a suitable amendment of the Regulations can put matters right.

This is not the first time that the anomaly has attracted criticial judicial comment. The observations of Sir John Arnold P. in *Jones v. The Law Society*, The Times, 27 and 28 January 1983, of Purchas L.J. in *Simmons v. Simmons* [1984] Fam. 17, 30-31 and of Waller L.J. in *Reg. v. The Law Society, Ex parte Sexton* [1984] Q.B. 360, 367 were duly considered by The Law Society and a considerable time has now elapsed since both The Law Society and the Lord Chancellor's Advisory Committee were of one mind in recommending in the Legal Aid Annual Report, 1984/85 (H.C. 156 1985/86) a suitable amendment of the Regulations. The White Paper, Legal Aid in England and Wales: A New Framework published on 26 March 1987 (Cm. 118) states: "The Government has already accepted these changes in principle. Regulations will be introduced to implement them as soon as practicable." If an early amendment of the Regulations can be expected, this will, of course, be welcome. But I cannot forbear to express concern that the administration of the legal aid scheme should have been disfigured for so long by the arbitrary and capricious impact of the statutory charge in matrimonial cases according to the difference in form of the order by which a spouse recovers property representing a share in the former matrimonial home. When the blemish can be removed by a simple amendment of the Regulations, any further delay would be intolerable.

I would reluctantly dismiss the appeal.

Lord Brightman. My Lords, I am in agreement with the speech delivered by my noble and learned friend Lord Bridge of Harwich and for the reasons given by him would dismiss this appeal.

Lord Templeman. My Lords, I am in agreement with the speech delivered by my noble and learned friend Lord Bridge of Harwich and for the reasons given by him would dismiss this appeal.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Bridge of Harwich. I agree with it and would with equal reluctance, dismiss the appeal for the reasons that he has given.

LORD GOFF OF CHIEVELEY. My Lords, I am in agreement with the speech delivered by my noble and learned friend Lord Bridge of Harwich and for the reasons given by him would dismiss this appeal.

Appeal dismissed.
No order as to costs.

Solicitors: Church Adams Tatham & Co. for Paris Oldham & Gijlstra, Birmingham; Collyer-Bristow.

C. T. B.

[PRIVY COUNCIL]

SOCIÉTÉ NATIONALE INDUSTRIELLE AEROSPATIALE . . . . . APPELLANTS

AND

LEE KUI JAK AND ANOTHER . . . . . RESPONDENTS

[APPEAL FROM THE COURT OF APPEAL OF BRUNEI DARUSSALAM]

1987 April 6, 7, 8, 9; May 14

Lord Keith of Kinkel, Lord Griffiths, Lord Mackay of Clashfern, Lord Goff of Chieveley and Sir John Megaw

Injunction—Jurisdiction to grant—Restraint of foreign proceedings—Brunei resident killed in helicopter crash in Brunei—Proceedings commenced in Brunei and Texas against French helicopter manufacturer—Manufacturer seeking indemnity against third parties in Brunei proceedings—Whether plaintiffs to be restrained from continuing with proceedings in Texas

A helicopter manufactured by a French company S., owned by an English company, and operated and serviced by a Malaysian company, crashed in Brunei. The deceased, who was a passenger, was killed. He and his family were resident in Brunei, and he was a successful businessman providing in particular catering services for oil rigs operating off Brunei. The plaintiffs, the deceased's widow and administrators of his estate,

instituted proceedings in Brunei against the Malaysian company and S., in France against S., and in Texas against, inter alia, S. and its associated companies and the Malaysian company and its associates. The Texas court had jurisdiction over S. because S. carried on business there. The French proceedings against S. were discontinued, and the plaintiffs' claim against the Malaysian company was settled. S. and its associated companies applied to the Texas court for dismissal of the plaintiffs' action there on the ground of forum non conveniens, and although other issues were also raised the judge dismissed the application without giving reasons. The plaintiffs' Texas attorneys commenced pre-trial discovery and trial was eventually fixed for 1 July 1987 in Texas. Meanwhile S. applied to the High Court of Negara Brunei Darussalam for an order restraining the plaintiffs from continuing with the Texas proceedings. The application was dismissed and S. appealed. The plaintiffs gave undertakings that they would agree to trial by judge alone in Texas, and they accepted that on trial in Texas the law of Brunei was applicable as to liability and quantum so that no claim lay against S. on the basis of strict liability or for punitive damages. S. gave undertakings to protect the position of the plaintiffs and their Texas attorneys in Brunei, and to facilitate trial of the action there in autumn 1987. A contribution notice was served by S. on the Malaysian company, which intimated that it would submit to Brunei but not Texas jurisdiction, and that it would accept service of a third party notice issued by S. in Brunei. S. accepted service in Brunei of a writ issued by the owners and insurers of the helicopter. The Court of Appeal of Brunei Darussalam dismissed S.'s appeal against the refusal to grant an injunction holding that having regard to the work done by the plaintiffs' Texas attorneys Texas had become the appropriate and natural forum.

On appeal by S.:—

Held, allowing the appeal, (1) that in considering whether an injunction should be granted to restrain a plaintiff beginning or pursuing an action in another jurisdiction, the court did not proceed on the same principles as those applied when granting a stay of proceedings on the ground of forum non conveniens; that the authorities showed that an injunction would be granted where justice required that a plaintiff amenable to the jurisdiction of the court should be restrained from proceeding in a foreign jurisdiction; and that, although the question of whether the plaintiff's action was oppressive or vexatious was material in determining whether the interests of justice required the plaintiff to be restrained from proceeding in the foreign jurisdiction, the court had also to consider the injustice to the plaintiff if restricted to the natural forum for determining the dispute if that restriction would unjustly deprive him of advantages available in the foreign forum (post, pp. 892E, 895C–F, 896C–H).

(2) That Brunei not Texas was the natural forum for the trial of the plaintiffs' action against S. and the work already undertaken by the lawyers in the Texas proceedings was not sufficient to make that court the natural forum for the determination of the dispute; that it would be oppressive for the plaintiffs to continue the Texas proceedings because of the serious injustice to S. in not being able to claim in those proceedings indemnity or contribution from the Malaysian company for any liability S. might have to the plaintiffs; and that, since the undertakings entered into by S. were sufficient

to ensure that any advantage to the plaintiffs in proceedings in Texas would be available in the proceedings in Brunei, no injustice would be caused to the plaintiffs by being restrained from proceeding in Texas and, accordingly, an injunction would be granted on terms set out in the undertakings (post, pp. 898F—899C, D, 902D–H).

McHenry v. Lewis (1882) 22 Ch.D. 397, C.A. and *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225, C.A. applied.

Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557, H.L.(E.) and *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, H.L.(E.) distinguished.

Quaere. Whether a foreign judgment gives a right to seek contribution from others in respect of the same damage (post, p. 902C–D).

Decision of the Court of Appeal of Brunei Darussalam reversed.

The following cases are referred to in the judgment of their Lordships:

British Airways Board v. Laker Airways Ltd. [1984] Q.B. 142; [1983] 3 W.L.R. 544; [1983] 3 All E.R. 375, Parker J. and C.A.; [1985] A.C. 58; [1984] 3 W.L.R. 413; [1984] 3 All E.R. 39, H.L.(E.)

Bushby v. Munday (1821) 5 Madd. 297

Carron Iron Co. v. Maclaren (1855) 5 H.L. Cas. 416, H.L.(E.)

Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.)

Cohen v. Rothfield [1919] 1 K.B. 410, C.A.

Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd., The Times, 20 March 1987, H.L.(Sc.)

Harris v. Empress Motors Ltd. [1984] 1 W.L.R. 212; [1983] 3 All E.R. 561, C.A.

Hyman v. Helm (1883) 24 Ch.D. 531, C.A.

MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.)

McHenry v. Lewis (1882) 22 Ch.D. 397, C.A.

North Carolina Estate Co. Ltd., In re (1889) 5 T.L.R. 328

Peruvian Guano Co. v. Bockwoldt (1883) 23 Ch.D. 225, C.A.

Pickett v. British Rail Engineering Ltd. [1980] A.C. 136; [1978] 3 W.L.R. 955; [1979] 1 All E.R. 774, H.L.(E.)

South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V. [1987] A.C. 24; [1986] 3 W.L.R. 398; [1986] 3 All E.R. 487, H.L.(E.)

Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)

St. Pierre v. South American Stores (Gath & Chaves) Ltd. [1936] 1 K.B. 382, C.A.

Young v. Barclay (1846) 8 Dunl. (Ct. of Sess.) 774

The following additional cases were cited in argument:

Armstrong v. Armstrong [1892] P. 98

Atlantic Star, The [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.)

Bank of Tokyo Ltd. v. Karoon (Note) [1987] A.C. 45; [1986] 3 W.L.R. 414; [1986] 3 All E.R. 468, C.A.

Bethell v. Peace (1971) 441 F. 2d 495

Bremen, The v. Zapata Off-Shore Co. (1972) 407 U.S. 1

Cargill Inc. v. Hartford Accident and Indemnity Co. (1982) 531 F.Supp. 710
Chase Manhattan Bank v. State of Iran (1980) 484 F.Supp. 832
Cole v. Cunningham (1890) 133 U.S. 107
Distin, In re (1871) 24 L.T. 197
Donovan v. City of Dallas (1964) 377 U.S. 408
Graham v. Maxwell (1849) 1 Mac. & G. 71
Hoover Realty Co. v. American Institute of Marketing Systems Inc. (1970) 179 N.W. 2d 683
Kline v. Burke Construction Co. (1922) 260 U.S. 226
Laker Airways Ltd. v. Sabena, Belgian World Airlines (1984) 731 F. 2d 909
Logan v. Bank of Scotland (No. 2) [1906] 1 K.B. 141, C.A.
Metall und Rohstoff A.G. v. ACLI Metals (London) Ltd. [1984] 1 Lloyd's Rep. 598, C.A.
Midland Bank Plc. v. Laker Airways Ltd. [1986] Q.B. 689; [1986] 2 W.L.R. 707; [1986] 1 All E.R. 526, C.A.
Moore v. Moore (1896) 12 T.L.R. 221, C.A.
Seattle Totems Hockey Club Inc. v. National Hockey League (1981) 652 F. 2d 852
Settlement Corporation v. Hochschild [1966] Ch. 10; [1965] 3 W.L.R. 1150; [1965] 3 All E.R. 486
Smith Kline & French Laboratories Ltd. v. Bloch [1983] 1 W.L.R. 730; [1983] 2 All E.R. 72, C.A.
Thornton v. Thornton (1886) 11 P.D. 176, C.A.
Unterweser Reederei GMBH, In re (1970) 428 F. 2d 888

Appeal (No. 13 of 1987) with leave of the Court of Appeal of Brunei Darussalam by Société Nationale Aerospatiale (S.N.I.A.S.) from the judgment of the Court of Appeal of Brunei Darussalam (Briggs P., Kempster and O'Connor, Judicial Commissioners) given on 20 March 1987 dismissing an appeal by S.N.I.A.S. from the judgment of Mr. Commissioner Rhind in the High Court of Negara Brunei Darussalam at Bandar Seri Begawan on 22 December 1986, written reasons being delivered on 16 January 1987, whereby S.N.I.A.S.'s application for an order that the plaintiffs, Lee Kui Jak and Yong Joon Kim (both suing as administrators of the estate of Yong Joon San, deceased, and Lee Kui Jak also suing in her personal capacity as widow of Yong Joon San) be restrained from further prosecuting the suit filed in the 61st Judicial District Court of Harris County, Texas, against S.N.I.A.S.

The facts are stated in the judgment of their Lordships.

Ian Hunter Q.C. and *David Joseph* for S.N.I.A.S. The first issue is whether, given that the proper approach to an application to stay domestic proceedings on the ground of forum non conveniens is that set out in the judgment of Lord Goff of Chieveley in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, 466, a similar approach is to be adopted (albeit recognising the need for caution) where the issue of forum non conveniens arises in the context of an application to restrain foreign proceedings. [Reference was made to that judgment of Lord Goff of Chieveley.] In *Spiliada's* case the House of Lords held that in order to determine whether a case was a proper one for service out of the jurisdiction under R.S.C., Ord. 11, r. 4(2), the court had, as in applications for a stay of proceedings on the ground of forum non

conveniens, to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice.

If that is the correct test the second issue is whether, when the various relevant connecting factors pointing to Brunei and Texas are properly analysed in accordance with the approach adopted in *Spiliada's* case [1987] A.C. 460 and proper weight is given to each, the balance is so heavily weighed in favour of Brunei that the question which, as between Brunei and Texas, is the more appropriate forum is capable of producing only one answer, namely Brunei. Furthermore, there is no reason why an injunction should not be granted against the plaintiffs, and every reason why it should in order to avoid injustice to S.N.I.A.S.

The two original reasons given by the plaintiffs for commencing proceedings in Texas, namely the stricter principles of law governing liability and a higher level of damages, were abandoned in the Court of Appeal, and the plaintiffs accepted that Brunei law would govern both liability and quantum in the Texas action. In support of their desire to preserve the hearing of the case in Texas the plaintiffs say that their Texas attorneys have particular expertise in personal injury cases and have done a certain amount of work, such that to require them now to make use of that work in the action in Brunei would involve unacceptable dislocation. However although it is unrealistic to suppose there will not be some dislocation, there need be very little, and the undertakings agreed between the parties show that the plaintiffs' claim can be pursued in Brunei with the minimum dislocation. The decision of the Court of Appeal appears to regard that minimal level of dislocation to the plaintiffs as outweighing all the other factors which point so firmly towards Brunei as clearly the more appropriate forum.

The most important connecting factors are the desirability of avoiding multiplicity of proceedings, the undesirability of inviting the Texas court to apply Brunei law and to determine a proper award of damages based on the Brunei level of awards, the location and convenience of the likely witnesses and the expense likely to be incurred in the continuing process of oral pre-trial discovery which has still to take place in various parts of the world.

The principal issue on liability is whether the accident was solely attributable to the fault of Bristow Malaysia, or whether fault on the part of S.N.I.A.S. contributed to the accident. It is obviously sensible for this issue to be decided in a single forum where the plaintiffs, Bristow Malaysia and S.N.I.A.S. are all parties to the proceedings, and it would be a disaster if that were not so. The Texas judge might decide that the accident was partly the fault of Bristow Malaysia and partly the fault of S.N.I.A.S. with the result that S.N.I.A.S. would be liable in full to the plaintiffs (less U.S. $430,000 received under the settlement). S.N.I.A.S. accept that they have little or no prospect of obtaining jurisdiction over Bristow Malaysia in Texas since there is no evidence that Bristow Malaysia has done business there. Although Bristow Malaysia are not prepared to submit to the jurisdiction of the Texas court they have submitted to the jurisdiction of the Brunei court. For a complete adjudication Bristow Malaysia's presence is essential, but

S.N.I.A.S.'s claim to an indemnity or contribution from Bristow Malaysia will necessarily have to be heard in Brunei.

It makes no sense for witnesses from Bristow Malaysia and Bristow U.K. to be deposed in Malaysia and England at great expense so that the issue of Bristow's involvement and liability can be argued in the Texas action and determined as between the plaintiffs and S.N.I.A.S., although those findings will not be binding as between S.N.I.A.S. and Bristow Malaysia, who will have to go through the same exercise again with enormous duplication of expense before the Brunei court. If the case proceeds in Texas there will be serious juridical disadvantage to S.N.I.A.S. because of multiplicity of proceedings.

The proper law is the law of Brunei. With regard to liability there is no evidence to suggest that there are any major differences between the law relating to negligence, causation and comparative fault in the two jurisdictions. If the trial judge makes errors of law it will be easier to argue questions of Brunei law before a Brunei Court of Appeal than before a Texas Court of Appeals.

With regard to quantum, the plaintiffs now accept that Brunei law, practice and levels of awards apply, and yet they still insist that the Texas judge should be asked to decide quantum. The position adopted by the plaintiffs makes no sense whatsoever. The likely amount of the award of damages is of the very greatest importance to both parties. The application of principles of law governing the calculation of a "lost years" award and the quantification of such a claim raise questions of the greatest difficulty. Given the claimed earnings of the deceased and his circumstances, there is nothing in the precedents to give any guide, and there has never been a case like it. It is wholly inappropriate to invite a Texas judge to undertake what is likely to be a most crucial aspect of this case. The task of the Texas Court of Appeals is likely to be even more difficult. In determining quantum the experience of the judge in fixing the proper sum is an important factor. Neither the judge in Texas nor the Court of Appeals would have any relevant experience. This factor is of the greatest importance in showing Brunei to be the appropriate forum.

In the context of a forum non conveniens application it is normal to consider the location of witnesses from the point of view of the convenience and expense of calling them to give evidence. As far as witnesses of fact are concerned this factor points in favour of Brunei. There are no Texas witnesses to give live evidence and there will almost certainly be witnesses from Malaysia. The French witnesses are probably a neutral factor, except that if S.N.I.A.S. takes them all to Texas and wins the case the costs of doing so will not be recoverable, because in Texas the successful party is not awarded his costs. The balance in relation to witnesses on quantum is firmly in favour of Brunei, and in relation to expert evidence it is marginally in favour of Brunei.

There is no question of the plaintiffs being required to break up their team or to waste any of the work which has been produced to date. S.N.I.A.S. have agreed to take no point on the admissibility in Brunei of any of the deposition evidence obtained so far which the plaintiffs may wish to have read at the trial. It would be open to the plaintiffs'

A Texas attorneys to be admitted ad hoc to the Brunei Bar for the purposes of this case, and S.N.I.A.S. have given an undertaking to cooperate in such admission. There will be no serious juridical disadvantage to the plaintiffs if the injunction is granted.

Any dislocation will be minimal, and there is reason to think that the case will proceed more expeditiously if it is now pursued in Brunei. The case will probably be ready for trial in Brunei by September or October B 1987, a date which looks highly optimistic if the proceedings remain in Texas. A trial date can be obtained in Brunei within a few weeks of the parties declaring themselves to be ready for trial.

The position so far as enforcement is concerned is much more satisfactory in Brunei. Included in the undertakings is a commitment on the part of S.N.I.A.S. to open two letters of credit to meet any C judgment and costs.

The case will be more expensive if it remains in Texas. The whole process of pre-trial discovery is notoriously expensive. S.N.I.A.S. take no moral stance with regard to the plaintiffs' Texas attorneys' contingency fee, but are concerned solely with the expense. Any litigation where the lawyers are due to take 40 per cent. of any recovery is overwhelmingly likely to be more expensive than where they receive a non-contingent D fee remuneration. Once it is accepted that the Brunei level of awards applies in Texas, and assuming that the plaintiffs can show at least 1 per cent. negligence on the part of S.N.I.A.S., the deceased's widow is bound to be worse off in Texas than in Brunei, where she will recover damages plus her taxed costs. S.N.I.A.S. have undertaken to treat all reasonable costs of the Texas attorneys as costs in cause in the Brunei E action, and likewise to treat all costs reasonably incurred in the future as costs in cause. The costs aspect points strongly in favour of Brunei.

Another factor in favour of Brunei is that the accident occurred there, it is the residence of the plaintiffs and it was the deceased's residence.

The Court of Appeal were wrong to place any real weight on the learning curve. The case has not gone far enough on the substantive F issues for this to be an important point. It is a fairly straightforward personal injury case, which is well within the abilities of experienced English counsel in the field, who will be able readily to assimilate the material and evidence collected by the Texas attorneys. The plaintiffs will not be deprived of any accumulated learning which the Texas attorneys have achieved since the middle of November 1986.

G The Court of Appeal were in error in that they applied the wrong test. Had they applied the correct test and properly analysed the evidence before them, giving proper weight to those connecting factors of particular importance such as the desirability of avoiding a multiplicity of proceedings, the proper law to be applied, the location of witnesses and the likely additional expense of continued proceedings in Texas, and not giving excessive weight to suggested dislocation or to the general H expertise or particular accumulated learning of the plaintiffs' Texas attorneys, the Court of Appeal ought to have concluded that Brunei was clearly the more appropriate forum and that it was a proper case to restrain the plaintiffs from proceeding in Texas.

[Reference was made to *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557.] The approach should be the same whether the case relates to a stay of domestic proceedings or an injunction to restrain foreign proceedings, except that in relation to an injunction the jurisdiction must be exercised with caution. In order to preserve its own jurisdiction the English court may need to restrain a person who is subject to its jurisdiction from taking proceedings abroad. The jurisdiction to restrain must be exercised cautiously and sparingly, and not simply because the English court takes a different view from that of the foreign court as to which is the more appropriate forum. The appropriate forum has to be first identified, and then it must be shown that it is necessary in the interests of justice that an injunction should be granted, and the court will do so.

British Airways Board v. Laker Airways Ltd. [1985] A.C. 58 can be distinguished, because the foreign forum was the only one with competent jurisdiction to determine the merits of Laker's claim. At first instance in that case [1984] Q.B. 142, 159, Parker J. set out the principles applicable to stay and restraint proceedings. [Reference was made to *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24 and *Bank of Tokyo Ltd. v. Karoon (Note)* [1987] A.C. 45.]

The approach of the courts in the United States is shown by the following: *Laker Airways Ltd. v. Sabena, Belgian World Airlines* (1984) 731 F. 2d 909; *Cole v. Cunningham* (1890) 133 U.S. 107; *Bethell v. Peace* (1971) 441 F.2d 495; *Donovan v. City of Dallas* (1964) 377 U.S. 408; *Seattle Totems Hockey Club Inc. v. National Hockey League* (1981) 652 F. 2d 852; *Kline v. Burke Construction Co.* (1922) 260 U.S. 226; *Hoover Realty Co. v. American Institute of Marketing Systems Inc.* (1970) 179 N.W. 2d 683; *In re Unterweser Reederei GMBH* (1970) 428 F. 2d 888; *The Breman v. Zapata Off-Shore Co.* (1972) 407 U.S. 1; *Chase Manhattan Bank v. State of Iran* (1980) 484 F.Supp. 832 and *Cargill Inc. v. Hartford Accident and Indemnity Co.* (1982) 531 F.Supp. 710. The principles are set out in *Corpus Juris Secundum,* vol. 43A (1975), para. 59. There is also a Scots authority: *Young v. Barclay* (1846) 8 Dunl. (Ct. of Sess.) 774.

Relevant English authorities are: *Bushby v. Munday* (1821) 5 Madd. 297; *Carron Iron Co. v. Maclaren* (1855) 5 H.L.Cas. 416; *Graham v. Maxwell* (1849) 1 Mac. & G. 71; *In re Distin* (1871) 24 L.T. 197; *In re North Carolina Estate Co. Ltd.* (1889) 5 T.L.R. 328; *McHenry v. Lewis* (1882) 22 Ch.D. 397; *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225; *Hyman v. Helm* (1883) 24 Ch.D. 531; *Cohen v. Rothfield* [1919] 1 K.B. 410; *Armstrong v. Armstrong* [1892] P. 98; *Moore v. Moore* (1896) 12 T.L.R. 221; *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730 and *Midland Bank Plc. v. Laker Airways Ltd.* [1986] Q.B. 689.

Applying the test laid down in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, Brunei is clearly the more appropriate forum. The next question is whether an injunction should be granted restraining the plaintiffs from continuing the proceedings in Texas. It would be oppressive for those proceedings to continue in view of the

position with regard to S.N.I.A.S.'s claim against Bristow Malaysia. If in Texas S.N.I.A.S. are held liable to the plaintiffs, S.N.I.A.S. would seek contribution from Bristow Malaysia in Brunei under section 6(1)(*c*) of the Law Reform (Married Women and Tortfeasors) Act 1935 (25 & 26 Geo. 5, c. 30). There may be difficulty in relying on a foreign judgment when seeking contribution: see *Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd.*, The Times, 20 March 1987, a decision on Scots law by the House of Lords, and *Clerk & Lindsell on Torts,* 15th ed. (1982), pp. 144–145. In the circumstances it would be unconscionable for the plaintiffs to continue their action in Texas.

Nicholas Chambers Q.C. and *Raymond Szetu* (of the Brunei and Malaysian Bars) for the plaintiffs. The position in relation to claiming contribution is not necessarily the same in English and Scots law. It is accepted that the law of Brunei will apply in the Texas court, and so a Texas judgment can be the basis of a claim by S.N.I.A.S. for contribution against Bristow Malaysia in Brunei. The wording of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 construed in *Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd.*, The Times, 20 March 1987, is different from that of section 6(1)(*c*) of the English Act of 1935 which is applicable in Brunei. Under section 6(1)(*c*) any tortfeasor "liable" in respect of the plaintiffs' damage can recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage. "Liable" only means responsible in law: *Clerk & Lindsell on Torts,* 14th ed. (1975), pp. 115–116. In reality S.N.I.A.S. will be able to claim contribution from Bristow Malaysia in Brunei, and the whole question of liability will not have to be reopened only the apportionment of responsibility for the accident as between S.N.I.A.S. and Bristow Malaysia. The same question of apportionment will arise in any event at the hearing of the claim by the owners and insurers of the helicopter. That claim will have to be tried separately in Brunei, and there is no reason why any claim by S.N.I.A.S. against Bristow Malaysia cannot be tried at the same time.

The plaintiffs want a speedy disposal of their claim. The hull claim and the third party proceedings have arisen at a very late stage, and so it may not be possible for the whole matter to be decided at the same time even in Brunei. If the case is heard in Texas the result may well govern the outcome of the other proceedings. The Court of Appeal doubted the seriousness of S.N.I.A.S.'s professed intention to seek contribution from Bristow Malaysia. It was not until the end of 1986 that S.N.I.A.S. indicated that they intended to bring Bristow Malaysia into the proceedings.

If the court is a court of equity applying equitable principles, it is entitled to have regard to the chronology. A situation can arise in which a step which should have been taken at an earlier stage should not now be permitted to defeat the rights of the other party. Even if S.N.I.A.S. have now evinced a genuine intention to claim over against Bristow Malaysia, the deceased died in 1980, proceedings were issued by the plaintiffs in 1981, S.N.I.A.S. failed in their vigorous attack on the jurisdiction of the Texas court, and only at this very late date is it suggested that Bristow Malaysia are necessary parties to the proceedings.

This should not be a compelling reason for restraining the plaintiffs from continuing the Texas proceedings. A

At the request of S.N.I.A.S. the Court of Appeal applied the test laid down in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, contrary to the submissions on behalf of the plaintiffs that that test did not apply to injunctions to restrain foreign proceedings. Nevertheless the Court of Appeal found for the plaintiffs. Much emphasis has been placed on whether Texas is the appropriate forum, but another question is whether Brunei is the natural and appropriate forum. Brunei is a small state lacking in facilities for proceedings of this kind. The parties will have to prepare their cases abroad. S.N.I.A.S. accept that it is appropriate that the Texas attorneys should prepare the case for the plaintiffs and that will have to be done in Texas. English counsel will probably be instructed, and they and the judge will have to travel to Brunei. The way in which the accident occurred will need detailed consideration by experts, who will be from outside Brunei. The Court of Appeal took into account all these factors and decided that Brunei was not the appropriate forum for trial of this matter. They considered that although Brunei law would be applicable, Texas is a common law jurisdiction and the judge would have little difficulty. A "lost years" claim is determined by the application of a formula, which can be applied just as well by a judge in Texas as by a judge in Brunei. The judge in Texas is required to disregard the 40 per cent. contingency fee. B C D

The fact that the plaintiffs will be unable to recover their costs if they succeed in Texas is not a factor to which weight should be attached, because that is the choice which the plaintiffs have made. The court may be entitled to have regard to policy considerations in a case of this sort, but there is nothing in the authorities to suggest that the plaintiffs should be constrained from bringing proceedings in Texas as a matter of public policy. E

The Texas proceedings have been going on for a long time and the plaintiffs should not now be stopped from continuing with them and forced to proceed in Brunei. In Texas there is an able and efficient team and the matter is being pursued with vigour. There are distinct practical advantages to the plaintiffs in proceeding there. The discovery process has been started by the plaintiffs' Texas attorneys and is not yet completed. The Texas discovery procedures have been used very effectively in France to obtain documents and oral testimony. Completion of discovery is very conducive to a settlement, because each party then has considerable knowledge of the other party's case. In the circumstances such pre-trial discovery is a considerable advantage to the plaintiffs. There will necessarily be dislocation if the case is transferred from Texas to Brunei, even if the plaintiffs can use the same team. The case having really got under way in Texas there are strong reasons for it continuing there. Regard must be had to the circumstances existing at the time when the matter falls for consideration: see *The Atlantic Star* [1974] A.C. 436. F G H

The artificiality of proceeding in Brunei is shown by the list of undertakings which S.N.I.A.S. were prepared to give if the case were to

be tried there. These undertakings are directed for the most part at curing deficiencies which must otherwise be the automatic result of transferring the case from Texas to Brunei. The momentum of the case is centred upon Texas, where the plaintiffs have the benefit of an expert term which has brought a case of complex fact well towards trial.

The Court of Appeal took into account the distribution of witnesses, and were clearly of the opinion that it would be better for the case to proceed in Texas rather than in Brunei. So far as liability is concerned, various experts went to Brunei to investigate after the helicopter had crashed. There is no indication that any relevant witness is in Brunei or Malaysia, and there are many from elsewhere. The plaintiffs wish to use Texas pre-trial discovery to question Bristow personnel in England. The plaintiffs have given a list of potential witnesses on the issue of damages. They deal not only with how the deceased conducted his activities, but also with the state of his businesses after his death. The oil industry is operated by multi-national concerns, and so various relevant witnesses as to damages do not live in or near Brunei. Texas judges have considerable knowledge of the oil industry. A balance has to be struck between the different factors. On behalf of S.N.I.A.S. it has been suggested that if the case is heard in Texas certain witnesses will have to go there from Brunei. It would not be a proper application of the relevant principles for the matter to be decided on the basis that some witnesses should not have to go from Brunei to Texas.

The Court of Appeal were fully entitled to reach the decision they did. The Board can interfere only if it considers that no reasonable court would have reached that conclusion. The Court of Appeal took into account all matters which it ought to have done and did not take into account any matter which it ought not to have done, and so the decision should be upheld.

To apply the test enunciated in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460 but only with extreme caution would be unworkable. The proper test should be that in order to justify an injunction restraining proceedings in a foreign jurisdiction by a person subject to the jurisdiction of the restraining court two conditions must be satisfied, one positive and one negative: (*a*) the defendant in the foreign proceedings must satisfy the court that the continuance of those proceedings would work an injustice because it would be oppressive or vexatious to him or otherwise an abuse of the process of the restraining court; and (*b*) the injunction must not cause injustice to the plaintiff.

The courts are anxious not to interfere with the rights of other jurisdictions, but they are willing to embrace proceedings brought within their own jurisdiction. In the nineteenth century the courts were concerned with parallel proceedings, where the same plaintiff was pursuing two actions in two jurisdictions. That is very different from the situation here where the plaintiffs only wish to prosecute one set of proceedings although they have commenced two sets in two jurisdictions. To justify the granting of an injunction the foreign proceedings must be vexatious or oppressive, and the court cannot merely consider which is the more appropriate forum. [Reliance is placed upon *Peruvian Guano Co. v. Bockwoldt,* 23 Ch.D. 225; *McHenry v. Lewis,* 22 Ch.D. 397;

Hyman v. Helm, 24 Ch.D. 531; *Thornton v. Thornton* (1886) 11 P.D. 176; *Logan v. Bank of Scotland (No. 2)* [1906] 1 K.B. 141; *Cohen v. Rothfield* [1919] 1 K.B. 410; *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382; *Settlement Corporation v. Hochschild* [1966] Ch. 10 and *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795.]

So far as restraint of foreign proceedings is concerned it is appropriate to retain the full connotation of the words "vexatious" and "oppressive." In single forum cases the courts have relied upon the fact that they do not have to apply the principle of forum non conveniens, and so they have applied the test of unconscionability instead: *Midland Bank Plc. v. Laker Airways Ltd.* [1986] Q.B. 689.

In *Metall und Rohstoff A.G. v. ACLI Metals (London) Ltd.* [1984] 1 Lloyd's Rep. 598, 613, Parker L.J. said that the law had developed rapidly in recent years, and although the principles upon which courts would stay proceedings here or restrain proceedings in another country were the same, there had to be a difference in approach, otherwise judicial pronouncements as to the need for caution in the latter case would have to be treated as no more than lip service to the respect which comity demanded should be paid to foreign courts. That shows the problem in restraint proceedings, because once a court decides which is the appropriate forum how can it then exercise caution? The statement by Lord Scarman in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, 574, that the principle governing the exercise of the court's discretion was the same whether the remedy sought was a stay of English proceedings or a restraint of foreign proceedings, is not supported by the authorities. It is not correct now to say that the test is the same.

The United States authorities do not support the view that the test is which is the appropriate forum. The importance of recognising the sovereignty of other forums is acknowledged there. It is not easy to discern the real trend in the United States, and there may well be situations where dual proceedings would be vexatious or oppressive, for example they may result in inconsistent decisions, and so an injunction restraining one set of proceedings will be granted. That would not defeat the plaintiffs' right to proceed in Texas, because the third party proceedings are not dual proceedings since they are not being brought by the same plaintiffs against the same defendants in respect of the same subject matter. With regard to the use of injunctions in the United States to stay proceedings in other courts see *Moore's Federal Practice,* 2nd ed. (1986), vol. 7, part 2, para. 65.19.

In all the circumstances the case should be tried in Texas not in Brunei. The Court of Appeal were correct in holding that an injunction restraining the plaintiffs from continuing the Texas proceedings should not be granted.

Hunter Q.C. in reply. It would be undesirable to have a wholly different test in restraint cases from that in stay cases. They are both concerned with the principle of forum non conveniens. The modern approach in common law jurisdictions is to determine which is the appropriate forum, and then to seek to give effect to that. The golden

A thread is what is proper to do justice. The court's approach is to be cautious in granting an injunction because it may interfere with a foreign process, although the injunction is directed against the particular party and not the foreign court. Accordingly, there must be a clear balance in favour of the injunction before it will be granted. Whatever is the correct test, this is clearly a case in which the plaintiffs should be restrained from continuing the Texas proceedings.

B

Cur. adv. vult.

14 May. The judgment of their Lordships was delivered by Lord Goff of Chieveley.

There is before their Lordships an appeal by the appellants, Société C Nationale Industrielle Aerospatiale (whom their Lordships will refer to as "S.N.I.A.S."), from a judgment of the Court of Appeal of Brunei Darussalam delivered on 20 March 1987, in which the Court of Appeal dismissed an appeal from a decision of Mr. Commissioner Rhind (delivered orally on 22 December 1986 and in writing on 16 January 1987) declining to grant an injunction restraining the plaintiffs from D continuing proceedings commenced by them in the 61st Judicial District Court of Harris County, Texas.

The matter has arisen as follows. On 16 December 1980 a Puma 330J helicopter crashed near Kuala Belait in Brunei. There were 12 people on board: all were killed. Among those killed was Yong Joon San.

Yong Joon San was a very successful businessman. His home was in Brunei, where he lived with his wife and children. His main business E (carried on by him under the name of Yong Joon San General Contractor) was a business in his sole proprietorship concerned with providing catering services to oil rigs and other structures operating off Brunei. He also had a much smaller business in Malaysia called Yong & Co., which was likewise in his sole proprietorship. It appears from the evidence presently available that Yong Joon San was making a very F substantial income from his business activities, and especially from his catering business in Brunei; and that in addition he was making substantial sums on the New York Stock Exchange. One estimate given of his income in the year before his death was over U.S.$1,800,000. It has also been stated that, by the time of his death, he had accumulated a fortune in the region of U.S.$20,000,000.

The Puma helicopter which crashed was manufactured by S.N.I.A.S. G in France in 1978. S.N.I.A.S. is a French company in the ownership of the French state. The helicopter in question was owned by an English company, British and Commonwealth Shipping Co. (Aviation) Ltd. ("British and Commonwealth"); but it was at all material times operated and serviced by Bristow Helicopters Malaysia Sdn. Bhd. ("Bristow Malaysia"), an associated company of Bristow Helicopters Ltd. ("Bristow U.K."), and was under contract to Sarawak Shell Bhd. and so was H based at Miri Airport in Sarawak. The Bristow companies are ultimately owned by British and Commonwealth.

The Brunei Government ordered an inquiry into the accident. The inquiry was conducted by the Brunei Chief Inspector of Accidents, Mr.

J. M. Holden. His report was submitted to the Director of Civil Aviation of Brunei on 20 July 1982. The main conclusion of the report was as follows:

> "the most likely cause of the accident was a planetary gear failure in the second stage of the two stage epicyclic main gear box reduction gear; the associated metal debris caused jamming within the rotating assemblies, generating forces which fractured the common epicyclic ring gear and the main gearbox casing. This resulted in a gross instability in the rotor system which caused blades to strike the fuselage."

It was further concluded:

> "The initial cause of the accident was due to the mistaken health monitoring of the gearbox leading to a deterioration of the mechanical condition of the gearbox components."

(Another possible cause was briefly mentioned, but their Lordships were informed that this is no longer regarded as a serious possibility and it can therefore be disregarded).

The point about "mistaken health monitoring of the gearbox" is explained in the body of the report. The maintenance practices to be followed in the event of gearbox contamination are set out in the S.N.I.A.S. Maintenance Manual, which refers to nickel or carbon steel particles taken from the filter and magnetic plug, and lays down a procedure to be followed in the event of over 50 square millimetres of such particles being collected. As is pointed out in the report, this implies that debris from the filter and magnetic plug should be laid out and measured on a cumulative basis until the maximum allowable measured area (50 square millimetres) is reached; at that stage, the relevant component (either main gearbox or main rotor head) should be returned to the factory and a new component fitted. The report continues:

> "On 30 January 1980 instructions had been received at Miri from Bristow Helicopters Ltd. in the United Kingdom, following advice from Aerospatiale, that 'metal particles which are less than 50mm sq., i.e. 6 x 8mm are acceptable.' This was attempting to confirm the information contained in the Standard Practices Manual.
>
> "Despite the above clarification, all the engineers concerned with the maintenance of Puma 9M-SSC at Miri misinterpreted the maximum allowable area of particles of 50mm^2 (50 square millimetres) and in all cases it was understood to mean the area of a square with 50mm sides (2,500 square millimetres).
>
> "According to Bristow's Deputy Chief Engineer at Miri, the practices recommended in the Maintenance and Standard Practices Manuals were carried out but there is no written record of the daily measured or cumulative total area of particle debris obtained from the filter and the magnetic plug. However, the actual debris was retained and subsequently handed over to the investigators who assessed the total area as 1,580mm^2 (1,580 square millimetres) or over 30 times the maximum allowable area."

A It was however later stated in the report:

> "although the Standard Practices Manual is categoric in stating that a gearbox which has produced more than 50mm^2 of metal should be removed and returned to the factory, the Miri engineers had some justification for thinking that this instruction was not to be taken too literally."

B In paragraph 3 of the report headed "Conclusions," finding 2 is as follows:

> "Gross contamination of the main gearbox magnetic plug and filter had occurred during the six weeks preceding the accident. The particles had undoubtedly originated from the second stage planet pinion bearing surfaces. Maintenance personnel had wrongly C interpreted the amount of allowable debris as defined in the Aerospatiale Standard Practices Manual, due to the mistaken interpretation of an unfamiliar metric term."

And in paragraph 4, headed "Recommendations," the first recommendation is as follows:

D
> "Any possibility of misinterpretation of the terms used in the Puma Standard Practices Manual, on the allowable areas of debris from the main gearbox, should be corrected."

Proceedings were started by Yong Joon San's widow, Lee Kui Jak, on her own behalf as widow and (with her husband's brother) as administrator of her husband's estate; they are the respondents to the E present appeal. For convenience their Lordships will refer to them as "the plaintiffs." Three sets of proceedings were started, in December 1981, in Brunei, France, and Texas respectively. The Brunei proceedings were issued on 9 December 1981 against Bristow Malaysia as first defendants and S.N.I.A.S. as second defendants; they were served on S.N.I.A.S. in December 1982. It was alleged that Bristow Malaysia were solely responsible for the accident; as against S.N.I.A.S., allegations F were made of negligent design and manufacture, but no particulars were given. The French proceedings were against S.N.I.A.S. alone. No further steps were taken in those proceedings, and they have been discontinued long ago. The Texas proceedings were also issued on 9 December 1981. Among the plaintiffs was a Richard J. Kittrell; it appears that he is a New York attorney who was appointed administrator G for the purpose of the proceedings, and was as such simply a nominal plaintiff. There were eight defendants in the Texas proceedings, who fall into three groups: (1) S.N.I.A.S., together with two United States associates of S.N.I.A.S.—Aerospatiale Helicopter Corporation ("A.H.C."), a Texas corporation, and European Aerospace Corporation ("E.A.C."), a Delaware corporation. (2) Bristow Malaysia, together with two United States associated companies—Bristow Helicopters Inc., H a Connecticut corporation, and Bristow Offshore Helicopters Inc., a Texas corporation. (3) Sarawak Shell Bhd., together with Shell Oil Co., a Delaware corporation. The plaintiffs' claim against S.N.I.A.S. was advanced under the Texas Wrongful Death Statute (section 71.031 of

the Texas Civil Practice and Remedies Code), which can apparently be invoked notwithstanding that the deceased had no connection with Texas and that the accident causing death occurred elsewhere, jurisdiction being asserted on the basis that S.N.I.A.S. were doing business in Texas by selling their products to purchasers in Texas, i.e. to their subsidiary A.H.C.. The lawyers responsible for launching the Texas proceedings were Messrs. Speiser, Krause and Madole of New York, a specialist firm of aviation lawyers, acting on the instructions of the plaintiffs' Brunei lawyer, Mr. Szetu. The reasons for launching them were subsequently stated by Mr. Szetu (in an affidavit dated 30 January 1984) to be (1) the more favourable Texas law on product liability, and (2) the higher level of damages awarded in courts in the United States. Shortly after the Texas proceedings were commenced, the Texas lawyers acting for S.N.I.A.S. attempted to have the case removed to the Federal Court; but in mid-1982 the Federal Court remitted the case back to the state court.

In the course of 1983, an agreement was reached whereby all proceedings as between the plaintiffs on the one hand, and the Bristow companies and the Shell companies on the other hand, were settled. A general release was granted to these companies by the plaintiffs and by Richard Kittrell. The amount payable, and no doubt paid, to the plaintiffs under the settlement was U.S.$430,000; of this sum, U.S.$107,500 was to go to Messrs. Speiser, Krause and Madole, and Mr. Kittrell. The settlement, together with an apportionment between the widow and her three children, was approved by the Chief Registrar in Brunei on 20 June 1984. S.N.I.A.S. were not parties to the settlement, and their Lordships were told that they were never invited to be parties to it.

Meanwhile, it appears that little progress was being made in the Texas proceedings against S.N.I.A.S. and their associated companies. However in March 1985 the plaintiffs decided to instruct fresh attorneys in the United States, changing from Messrs. Speiser Krause and Madole of New York to a Mr. Mithoff and Mr. Jacks, members of two comparatively small firms which practise in Houston, Texas, and which specialise in personal injury claims. Thereafter, it seems that they proceeded to obtain discovery with a view to establishing jurisdiction over the three Aerospatiale defendants. However in February 1986 a vigilant computer drew the attention of the Texas court to the lack of progress in these proceedings, and the court of its own motion took the formal step of listing the case for dismissal for want of prosecution. On 14 March 1986, the plaintiffs filed a motion to retain; and on 28 May 1986 the defendants filed a motion to dismiss on the ground of forum non conveniens. The court decided not to dismiss the action for want of prosecution, but fixed a trial date for 10 November 1986. Briefs were filed on the motion to dismiss on the ground of forum non conveniens. This motion was opposed by the plaintiffs on two grounds: (1) that where a claim is made under the Texas Wrongful Death Statute, as a matter of construction the doctrine of forum non conveniens has no application; and (2) that, in the alternative, the court should in any event exercise its discretion to refuse the defendants' motion on the

A ground of forum non conveniens. On 14 August 1986, the Texas court refused the defendants' motion. In accordance with the practice of that court, no reasons were given for the decision; it is impossible therefore to know whether the decision was made on the first or the second ground advanced by the plaintiffs, nor, if the decision was made on the second ground, for what reasons it was held that the Texas court should not give effect to the doctrine of forum non conveniens. Furthermore, B under the procedure of the Texas court, no appeal lay from this decision. An attempt was made to have the decision reviewed by petitioning the Court of Appeals for a writ of mandamus; but this failed, the petition being dismissed on 2 October 1986. A further petition to the Texas Supreme Court was dismissed on 5 November 1986; and a petition for a rehearing was dismissed on 3 December 1986. By then, the C defendants had exhausted their remedies in Texas. Meanwhile the plaintiffs' new Texas attorneys had turned their attention to the substantive issues in the case, taking depositions from a number of employees of A.H.C. in Texas. The trial date of 10 November 1986 was vacated as impracticable; and a new date was fixed for February 1987. That date, too, has since been vacated; the trial in Texas is at present fixed for 1 June 1987. Between December 1986 and March 1987, a D number of depositions were taken by the plaintiffs' Texas attorneys in France from employees of S.N.I.A.S.

In December 1986, having failed in their attempts to obtain dismissal of the proceedings against them and their associated companies in Texas, S.N.I.A.S. turned their attention to the possibility of obtaining an injunction from the Brunei court restraining the plaintiffs from E continuing the Texas proceedings. Having taken advice from English and Brunei solicitors, it was decided to make an immediate application because it transpired that a judge would be available until 23 December 1986 but that thereafter no judge would be available until late January 1987. Accordingly, the application was made to Mr. Commissioner Rhind on 20 December 1986; on 22 December, he refused to grant an injunction, giving his reasons in writing later, on 16 January 1987. It is F now accepted on both sides that, due to the limited time available, the evidence laid before the commissioner was inadequate and, to some extent, misleading. Their Lordships trust that, in these circumstances, they will not be thought to be lacking in courtesy if they do not refer to his judgment.

S.N.I.A.S. then lodged a notice of appeal and, having regard to the G urgency of the matter, a Court of Appeal was specially assembled to hear the appeal in March 1987. The hearing began on 10 March. Substantial further evidence was put in by both sides in the course of the hearing of the appeal: indeed it was common ground between the parties that the Court of Appeal should consider the matter de novo. An additional reason for taking this course was that a full report of the decision of the House of Lords in *Spiliada Maritime Corporation v.* H *Cansulex Ltd.* [1987] A.C. 460 was available to the Court of Appeal; no such report had been available to Mr. Commissioner Rhind. Furthermore, during the hearing undertakings were given by both sides, no doubt with a view to fortifying their respective positions. The plaintiffs first stated

that, if S.N.I.A.S. wished for trial by judge alone in Texas, the plaintiffs would agree to such a trial. Second, they accepted that, the law of Brunei being applicable both as to liability and quantum in respect of the trial of the matter in Texas, no claim lay against S.N.I.A.S. either (a) in consequence of strict liability, or (b) for punitive damages. In their turn, S.N.I.A.S. gave a number of undertakings. These run to nearly three pages; the full text is appended to this opinion. The most important are the following:

> "1. To provide the plaintiffs within 28 days with two irrevocable letters of credit drawn in their favour and confirmed by a first class bank within Brunei in the terms annexed hereto . . .
> "5. That the Texas proceedings shall be permitted to continue until completion of pre-trial discovery. (S.N.I.A.S.' position is that they are willing to undertake that they will procure A.H.C. to make any further documentary discovery of documents in the possession custody or power of A.H.C. which plaintiffs may require. S.N.I.A.S. are unwilling to accept further deposition-taking in Texas unless the court takes the view that no injunction will be granted in the absence of such undertaking).
> "6. To agree to a trial date in September/October 1987 or as soon thereafter as may be convenient to the court and to cooperate in every way practicable to keep such date effective.
> "7. To cooperate in every practicable way in the admission to the Bar of Brunei Darussalam as ad hoc members for the purposes of this action of: William Thomas Jacks and Richard Warner Mithoff.
> "8. To take all such steps as may be necessary to obtain all relevant consents for the use in this action of any documents obtained by discovery in the Texas action."

The undertakings of S.N.I.A.S. included in addition two alternative clauses regarding the payment of the costs of the plaintiffs' Texas attorneys.

In addition, there were certain developments regarding the position of Bristow Malaysia. In the course of the hearing before the Court of Appeal, a contribution notice was served on Bristow Malaysia by S.N.I.A.S. It has been suggested that this was in fact too late, because Bristow Malaysia were no longer parties to the action. But this was disputed, and in any event Bristow Malaysia have indicated their readiness to accept service within the jurisdiction of the Brunei court of any third party notice issued by S.N.I.A.S. It appears that, whereas Bristow Malaysia are vigorously resisting Texas jurisdiction on the ground that they have never done business in Texas, they have indicated their readiness to submit to the jurisdiction of the courts in Brunei to enable the whole case to be determined there. On the same day, 18 March 1987, S.N.I.A.S. accepted service of a writ issued against them on 16 December 1986 (one day before the expiry of the limitation period) by the owners of the crashed helicopter together with the insurers of the hull.

Their Lordships now turn to the judgments of the Court of Appeal. The leading judgment was delivered by Mr. Commissioner Kempster.

A He referred first to the speech of Lord Scarman in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557. In his speech, at p. 573, Lord Scarman recognised that, in a case where a party seeks to enjoin another party from proceeding against him in another jurisdiction, such an injunction can be granted "where it is appropriate to avoid injustice." He then said, at p. 574:

B

> "I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings."

Next, he referred, at p. 575, to a much quoted passage from Lord C Diplock's speech in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812, concerning the circumstances in which a stay of proceedings may be granted:

> "'In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at D substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.'"

Lord Scarman continued, at p. 575:

E

> "Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (*a*) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, *and (b)* the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction."

F

Mr. Commissioner Kempster then proceeded to apply the principle thus stated by Lord Scarman. He first considered a submission advanced by Mr. Hunter for S.N.I.A.S. that justice could be done in Brunei at substantially less expense to them because, if held liable to the plaintiffs, they intended to seek contribution or indemnity from Bristow Malaysia who were not amenable to the jurisdiction of the court in Texas, and G one set of proceedings in Brunei involving the plaintiffs, S.N.I.A.S. and Bristow Malaysia would be less expensive than two sets of proceedings, one between the plaintiffs and S.N.I.A.S. in Texas and another between S.N.I.A.S. and Bristow Malaysia in Brunei. Mr. Commissioner Kempster declined to accept this submission. He considered that a "desperate flurry of procedural steps" had been "procured" by S.N.I.A.S. to H support this argument. He said:

> "The contribution point does not appear to have been argued before Mr. Commissioner Rhind, though the convenience of Brunei for Bristows was urged, and had only belatedly been mentioned in

the course of the attempts to challenge the jurisdiction of the Texan courts. A party seeking a discretionary remedy must get his tackle in order and proceed with due expedition and Aerospatiale had no good reason to defer the service of a contribution notice on Bristows in Brunei particularly after receipt of a letter in April 1983 telling them of the settlement between the plaintiffs and Bristows. A fortiori after their objections to the Texan jurisdiction had to all intents and purposes failed in August 1986. Securing the promise of Bristows to submit to the jurisdiction after inquiry by this court as to the real state of play comes, in my view, too late to allow a real rather than a hypothetical possibility of proceedings both in Texas and Brunei (lis alibi pendens) to weigh in the balance."

He then turned to consider "personal or juridical advantages" redounding to the advantage of the plaintiffs by continuing the suit in Texas. He recognised that the plaintiffs no longer maintained that they had the advantage of strict liability or the prospect of higher damages in Texas; though he considered that there was a prospect of an early hearing in Texas. He further referred to "substantial pre-trial discovery of documents and witnesses" which had taken place and continued to take place due to the industry of the Texan attorneys acting for the plaintiffs, and to the fact that these attorneys were familiar with the case. He concluded:

"In my opinion the prospects of an early trial and the availability of a skilled professional team, both in Texas, constitute personal and juridical advantages of which the plaintiffs should not lightly be deprived."

On a submission by S.N.I.A.S. that the Brunei courts were better able to apply Brunei law on liability and quantum, he declined to query the competence of the Texas judiciary on these matters. Costs he regarded as a neutral factor; so also, in the light of S.N.I.A.S.'s undertaking to open letters of credit to cover a possible award of damages and costs, did he regard the availability of assets to satisfy any judgment against S.N.I.A.S. He took into account the other undertakings of S.N.I.A.S. On this aspect of the case, he concluded:

"It transpires that no witnesses relevant to liability are presently to be found in Brunei and only a few relevant to damages. That the helicopter crashed here rather than in Malaysia was fortuitous; the only real links with this country being the residence of the deceased and his family, the applicability of its law and the fact that a report on the accident was prepared here. Applying the principles enunciated by Lord Scarman in *Castanho* in the light of the foregoing conclusions and undertakings I am satisfied that Aerospatiale has failed to demonstrate that justice can be done in Brunei at substantially less inconvenience and expense than in Texas and, in so far as it is necessary so to determine, that the injunction sought would deprive the plaintiffs of legitimate personal and juridical advantages."

Mr. Commissioner Kempster then turned to consider whether, and if so how, the principles outlined in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 had been affected by the subsequent decision of the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460. He said:

> "It remains to consider whether and if so how the principles outlined in *Castanho* have been affected by the subsequent decision of the House of Lords in *Spiliada* when, as in the instant case, 'parties to a dispute have chosen to litigate in order to determine where they shall litigate.' Lord Goff's speech does not purport to deal with the grant or refusal of an injunction restraining the continuance of proceedings overseas but it does, I think, nonetheless require us to consider the application to the material facts of the 'forum non conveniens' doctrine. After all it would be inelegant and anomalous to say the least if similar principles did not fall for consideration in the three related types of application giving rise to the authoritative decisions already cited. Which then is the 'appropriate' or 'natural' forum in the sense that litigation there is the more likely to secure the ends of justice? If it is Brunei, the jurisdiction with which, in 1981, the dispute might have been thought more closely connected, it will be proper to consider the exercise of our discretion but if, for the reasons already given when seeking to apply the *Castanho* principles, it is or has since become, as I believe, Texas it will be wrong in principle to consider such exercise. Likewise if we were not satisfied that any forum was 'appropriate' or 'natural.' However the problem is approached I am satisfied that Mr. Commissioner Rhind was right in finding that Texas is presently the 'appropriate' and 'natural' forum and that Aerospatiale fail in their application. The relief sought is not necessary in the interests of justice. I would dismiss the appeal accordingly."

Mr. Commissioner O'Connor delivered a concurring judgment to the same effect. The President of the Court, Sir Geoffrey Briggs, agreed.

It is plain from their judgments that the Court of Appeal were concerned, and understandably concerned, about the relationship between the decisions of the House of Lords in *Castanho's* case [1981] A.C. 557 and *Spiliada's* case [1987] A.C. 460. Since a proper identification of the applicable legal principles lies at the heart of the present case, their Lordships consider that their first duty is to identify those principles, giving due consideration to those two decisions. That they should undertake this task is, they consider, all the more necessary because certain observations of Lord Scarman in *Castanho's* case [1981] A.C. 557 are substantially founded on the much-quoted dictum of Lord Diplock in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812, which has to a considerable extent been overtaken by the subsequent development of the law in *Spiliada's* case [1987] A.C. 460, 475–478, and 482–484. For this purpose, no material distinction is to be drawn between the law of Brunei and the law of England.

The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early 19th century. From an early stage, certain basic principles emerged which are now beyond dispute. First, the jurisdiction is to be exercised when the "ends of justice" require it: see *Bushby v. Munday* (1821) 5 Madd. 297, 307, *per* Sir John Leach V.-C.); *Carron Iron Co. v. Maclaren* (1855) 5 H.L. Cas. 416, 453, *per* Lord St. Leonards (in a dissenting speech, the force of which was however recognised by Lord Brougham, at p. 459). This fundamental principle has been reasserted in recent years, notably by Lord Scarman in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557 and by Lord Diplock in *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 81. Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. As Sir John Leach V.-C. said in *Bushby v. Munday,* 5 Madd. 297, 307:

> "If a defendant who is ordered by this court to discontinue a proceeding which he has commenced against the plaintiff, in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceeding, this court does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the court;. . ."

There are, of course, many other statements in the cases to the same effect. Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy: see, e.g. *In re North Carolina Estate Co. Ltd.* (1889) 5 T.L.R. 328, *per* Chitty J. Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution: see e.g., *Cohen v. Rothfield* [1919] 1 K.B. 410, 413, *per* Scrutton L.J., and, in more recent times, *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, 573, *per* Lord Scarman. All of this is, their Lordships think, uncontroversial; but it has to be recognised that it does not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case.

The decided cases, stretching back over a hundred years and more, provide however a useful source of experience from which guidance may be drawn. They show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories. Their Lordships were helpfully taken through many of the authorities by counsel in the present case. One such category of case arises where an estate is being administered in this country, or a petition in bankruptcy has been presented in this country, or winding up proceedings have been commenced here, and an injunction is granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets. In such cases, it may be said that the purpose of

A the injunction is to protect the jurisdiction of the English court. Indeed, one of their Lordships has been inclined to think that such an idea generally underlies the jurisdiction to grant injunctions restraining the pursuit of foreign proceedings: see *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24, 45, *per* Lord Goff of Chieveley; but their Lordships are persuaded that this is too narrow a view. Another important category of case in which B injunctions may be granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter both in this country and overseas, and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed. In such cases, there is authority that the court will only restrain the plaintiff from pursuing the foreign proceedings if the pursuit C of such proceedings is regarded as vexatious or oppressive: see *McHenry v. Lewis* (1882) 22 Ch.D. 397 and *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225. Since in these cases the court has been presented with a choice whether to restrain the foreign proceedings or to stay the English proceedings, we find in them the germ of the idea that the same test (i.e. whether the relevant proceedings are vexatious or oppressive) is applicable in both classes of case, an idea which was to bear fruit in D the statement of principle by Scott L.J. in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382, 398, in relation to staying proceedings in this country, a statement of principle now overlaid by the adoption in such cases of the Scottish principle of forum non conveniens, which has been gratefully incorporated into English law.

The old principle that an injunction may be granted to restrain the E pursuit of foreign proceedings on the grounds of vexation or oppression, though it should not be regarded as the only ground upon which the jurisdiction may be exercised, is of such importance, and of such apparent relevance in the present case, that it is desirable to examine it in a little detail. As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasised that the notions of vexation and oppression should not be restricted by definition. As F Bowen L.J. said in *McHenry v. Lewis*, 22 Ch.D. 397, 407–408:

> "I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general G principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case."

In *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225, 230, H Jessel M.R. gave two examples of vexatious proceedings. One, which he called pure vexation, occurs when the proceedings are so utterly absurd that they cannot possibly succeed. Another occurs when the plaintiff, not intending to annoy or harass the defendant, but thinking he could

get some fanciful advantage, sues him in two courts at the same time under the same jurisdiction. He went on to say that similar, although not perhaps the same, considerations apply in a case where the actions are brought, one in a foreign country and one in this country. Referring to *McHenry v. Lewis*, 22 Ch.D. 397, he summed up the position as follows: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. Now, it is easy to see why in many cases this is so, as indeed the 19th century cases show. For example, there may be assets available for execution in a foreign country, or another party may only be amenable to the jurisdiction of the courts of the foreign country. Indeed, it has been stressed that there is no presumption that a multiplicity of proceedings is vexatious (see e.g. *McHenry v. Lewis*, 22 Ch.D. 397, 400 *per* Jessel M.R.) and that proceedings are not to be regarded as vexatious merely because they are brought in an inconvenient place: see *Hyman v. Helm* (1883) 24 Ch.D. 531, 537, *per* Brett M.R. But their Lordships, bearing in mind the words of caution expressed by Bowen L.J. in *McHenry v. Lewis*, 22 Ch.D. 397, 407–408, quoted above, think it wise to remember the breadth of the jurisdiction. In particular, the possibility must be borne in mind that foreign proceedings may be restrained not only where they are vexatious, in the sense of being frivolous or useless, but also where they are oppressive; and also that, as Bowen L.J. observed, everything depends on the circumstances of the particular case, and new circumstances have emerged which were not, perhaps, foreseen by our Victorian predecessors. Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there. In normal circumstances, application of the now very widely recognised principle of forum non conveniens should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction, especially as the existence of any particular advantage to the plaintiff in that jurisdiction (e.g. availability of assets for execution within the jurisdiction) can usually be protected, if thought appropriate, by granting a stay upon terms. But a stay may not be granted; and if, in particular, the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court. As Bowen L.J. said in *Peruvian Guano Co. v. Bockwoldt,* 23 Ch.D. 225, 233, the court will interfere when a party is acting under colour of asking for justice "in a way which necessarily involves injustice" to others.

Now, as already recorded, in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, Lord Scarman expressed the opinion that it was no longer necessary to examine the earlier case law. He said, at p. 574:

> "I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is

A unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings."

He then, at p. 575, proceeded to refer to the much-quoted dictum from the speech of Lord Diplock in *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 812, and said, at p. 575:

B "Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (*a*) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience or expense, *and (b)* the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which C would be available to him if he invoked the American jurisdiction."

Now it is to be observed, in the first place, that that approach has been overtaken by events in the form of the decision of the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460. If Lord Scarman's approach in *Castanho's* case were to be adapted to take account of the statement of principle expressed in *Spiliada's* case D as applicable in cases of stay of proceedings, it would presumably read as follows. To justify the grant of an injunction, the defendant must show: (a) that the English court is the natural forum for the trial of the action, to whose jurisdiction the parties are amenable; *and* (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.

In practice, however, the principle so stated would have the effect E that, where the parties are in dispute on the point whether the action should proceed in an English or a foreign court, the English court would be prepared, not merely to decline to adjudicate by granting a stay of proceedings on the ground that the English court was forum non conveniens, but, if it concluded that England was the natural forum, to restrain a party from proceeding in the foreign court *on that ground* F *alone.* Their Lordships cannot think that this is right. Not only does it conflict with the observation of Brett M.R. in *Hyman v. Helm,* 24 Ch.D. 531, 537, referred to above: but it leads to the conclusion that, in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunction, the power to resolve that dispute. Indeed, in a passage in his speech in *British* G *Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 80, Lord Diplock appears to have been ready to give credence to this approach. But, with all respect, such a conclusion appears to their Lordships to be inconsistent with comity, and indeed to disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require. Furthermore, if it were right, it would lead to the remarkable conclusion that, in a case such as *MacShannon v. Rockware Glass Ltd.* [1978] A.C. H 795, the Scottish court, having concluded that Scotland was the natural forum for the trial of the action, might for that reason alone grant an interdict restraining the plaintiffs from proceeding in England. Their Lordships are fortified in their opinion by the fact that, upon examining

a number of authorities from the United States (for the citation of which they are much indebted to counsel), a country where the principle of forum non conveniens is recognised as applicable in cases of stay of proceedings, and also authorities from the law of Scotland in which that principle has long been so applicable, they can find no trace of any suggestion that the principles applicable in cases of stay of proceedings and in cases of injunctions are the same. On the contrary, the principles applicable in those countries in cases of injunctions to restrain foreign proceedings bear a marked resemblance to those which have been applicable for many years in this country. Certainly, this has long been the law in Scotland: see, e.g. *Young v. Barclay* (1846) 8 Dunl. (Ct. of Sess.) 774, where an interdict was granted restraining the pursuit of proceedings overseas on the ground that they were oppressive. There are numerous cases in the United States to the like effect. It is enough for present purposes to refer to *Moore's Federal Practice,* 2nd ed. (1986), vol. 7, part 2, para. 65.19.

For all these reasons, their Lordships are of the opinion that the long line of English cases concerned with injunctions restraining foreign proceedings still provides useful guidance on the circumstances in which such injunctions may be granted; though of course the law on the subject is in a continuous state of development. They are further of the opinion that the fact that the Scottish principle of forum non conveniens has now been adopted in England and is applicable in cases of stay of proceedings provides no good reason for departing from those principles. They wish to observe that, in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, care was taken to state the principle of forum non conveniens without reference to cases on injunctions: see especially, at p. 480, *per* Lord Goff of Chieveley. They cannot help but think that the suggestion in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, 574, that the principle is the same in cases of stay of proceedings and in cases of injunctions finds its origin in the fact that the argument of counsel before the House of Lords appears to have proceeded very substantially upon that assumption. In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction upon appropriate terms; just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is,

prima facie, inappropriate, can likewise often be solved by granting a stay upon terms.

It follows that, through no fault of theirs, the Court of Appeal did not proceed upon the correct principles in considering whether or not to grant an injunction in the present case. It is necessary therefore for their Lordships to consider de novo, upon the applicable principles as stated by them, whether the decision to refuse an injunction should stand.

Now if a question (which their Lordships accept could only be hypothetical) had arisen shortly after the commencement of proceedings by the plaintiffs in Brunei whether those proceedings should be stayed on the ground that there existed another forum, i.e. Texas, which was clearly more appropriate for the trial of the action, there can be no doubt that such a question would have been answered unhesitatingly in the negative. Obviously, there were strong connecting factors with Brunei as a forum. The fatal accident had happened there. In a sense that was fortuitous; but it carried with it the consequence that the applicable law governing the claim was the law of Brunei. Moreover that was by no means insignificant in the circumstances because, as compared with the law of Texas, no question arises under the law of Brunei of strict product liability; no question arises under the law of Brunei of punitive damages; and, perhaps most important of all, the problem does arise under the law of Brunei of an award of damages for the so called "lost years," a matter which, in the experience of some of their Lordships, has proved to be difficult enough even for those judges who have experience of it: see, in particular, *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136, and *Harris v. Empress Motors Ltd.* [1984] 1 W.L.R. 212. In addition, the deceased was resident in Brunei and carried on his principal business there; and the plaintiffs, his widow and her co-administrator, are likewise resident in Brunei. Again, having regard to the very substantial income of the deceased, and the volatile nature of the oil industry upon which his business depended, it is plain that witnesses of fact, experienced in the conditions of that industry in Brunei, are likely to be called on the issue of quantum. As against these factors, there was absolutely nothing to connect the action with Texas at all.

Yet the Court of Appeal, like Mr. Commissioner Rhind, concluded that, by the time the matter came before them, Texas has become the natural forum for the trial of the action. In order to test that proposition it is necessary to examine what had happened to bring about, in their opinion, that change.

It is primarily on the basis of the steps taken by the plaintiffs' Texas attorneys, in late 1986 and early 1987, that the Court of Appeal considered that the natural forum for the trial of the action had become Texas. In reaching that conclusion, they decided to disregard the question of proceedings by S.N.I.A.S. against Bristow Malaysia; as to that they were, in the opinion of their Lordships, in error, for reasons which will appear later. But they placed particular reliance on the work done in Texas by the plaintiffs' new Texas attorneys. In placing reliance on this factor, there is no doubt that they were influenced by the importance attached by the trial judge in *Spiliada Maritime Corporation*

v. Cansulex Ltd. [1987] A.C. 460 to the so-called "*Cambridgeshire* factor," a matter which was also recognised as relevant by the House of Lords: see pp. 985–986, *per* Lord Goff of Chieveley. But, with all respect, the two cases are poles apart. In *Spiliada's* case the question at issue was the effect of wet sulphur upon the holds of ships. This question was of profound importance, not only to the shipping industry, but to the whole sulphur exporting industry in British Columbia. The first case in which the question was investigated in depth was concerned with a ship called the *Cambridgeshire,* and was plainly recognised as in the nature of a test case. Armies of lawyers and experts were engaged. An enormous amount of preparatory work was undertaken; the documentation was voluminous in the extreme. The scientific investigation was of a most fundamental kind, and indeed approached the limits of scientific knowledge. The trial of the *Cambridgeshire* action was begun and had proceeded for about a month when the application was made for a stay of proceedings in *Spiliada's* case, a parallel case raising the same profound scientific questions as those which had arisen in the *Cambridgeshire.* The application came on for hearing before Staughton J., the trial judge in the *Cambridgeshire* action. In these somewhat unusual circumstances, it is scarcely surprising that he regarded the building up of expertise and understanding among the teams of lawyers and experts in England as being a relevant factor to be taken into account when deciding whether or not to order a stay of the English proceedings in *Spiliada's* case; this view was shared by the House of Lords, where it was pointed out that, in addition, the parties in both actions were substantially the same—Cansulex Ltd. being defendants in both actions, and the plaintiff shipowners in both actions being insured by the same P. and I. club who were financing and controlling both sets of proceedings, and instructing the same lawyers in both.

Now compare that case with the present. Here there are no previous proceedings in Texas involving substantially the same parties. Here the issues do not begin to approach in complexity those involved in the *Cambridgeshire* and the *Spiliada.* Their Lordships do not wish for one moment to belittle the expertise or competence of Mr. Mithoff or Mr. Jacks; but the engineering issues which arise in the present case do not appear to be, in degree, of greater complexity than those which many lawyers, in England and in the United States, are very competent to deal with and can very readily assimilate. What has happened is simply that, during and after the period when S.N.I.A.S. was seeking to obtain dismissal of the Texas proceedings on the ground of forum non conveniens, the plaintiffs' Texas lawyers were, in accordance with the procedure in the United States (as to which their Lordships make no criticism) seeking, by means of the generous United States procedure of pre-trial oral discovery, evidence upon which they could found a case of negligence against S.N.I.A.S. The extent of their success in this activity will no doubt be judged at the trial of the action. The nature of the case which they wish to advance against S.N.I.A.S. has now been made known and, although of course contested by them, is recognised by S.N.I.A.S. to be arguable. But their Lordships do not consider that the fact that the Texas lawyers have been so engaged during the period in

A question can possibly have the effect of now rendering Texas the natural forum for the trial of the action instead of Brunei. In truth, the matters relied upon by the plaintiffs (viz. superior means of gathering evidence to mount a case against S.N.I.A.S.; availability of expert counsel; the contingency fee system; prospects of an early trial) are not so much connecting factors with Texas which now render Texas the natural forum as advantages available to the plaintiffs in Texas of which, they B submit, it would be unjust to deprive them. In any event, these points have effectively been neutralised by undertakings given on behalf of S.N.I.A.S. that such evidence as has been obtained by Mr. Mithoff and Mr. Jacks will be available in the Brunei proceedings, that every effort will be made by S.N.I.A.S. to enable Mr. Mithoff and Mr. Jacks to have rights of audience in Brunei, and that they will cooperate in C obtaining an early trial date there. No doubt both American attorneys would feel more at home in the courts in Texas; but that cannot be a matter of any relevance, especially as, in a case involving a claim assessed by the plaintiffs at many millions of dollars, they may well wish to instruct leading counsel from England, a course which they have indeed already taken in the injunction proceedings in Brunei and, of course, before their Lordships.

D It follows that, in their Lordships' opinion, the Court of Appeal, in concluding that Texas had replaced Brunei as the natural forum, took into account matters which they ought not to have taken into account. In the opinion of their Lordships, for reasons which are already apparent, the natural forum for the trial of the action remains, as it always has been, the courts of Brunei.

E It is against that background that their Lordships have to consider the crucial question, which is whether in the circumstances of this case an injunction should be granted to restrain the plaintiffs from further proceeding in Texas. The mere fact that the courts of Brunei provide the natural forum for the action is, for reasons already given, not enough of itself to justify the grant of an injunction. An injunction will only be granted to prevent injustice, and, in the context of a case such F as the present, that means that the Texas proceedings must be shown in the circumstances to be vexatious or oppressive.

Now it can no longer be suggested that the Texas proceedings are vexatious or oppressive on the ground that the plaintiffs are seeking, in an inappropriate forum, to impose a strict liability or liability for punitive damages which would not be available in the natural forum. G These points have been effectively neutralised by the plaintiffs' undertaking that neither of them will be pursued, and by their further undertaking that they will not invoke jury trial which, coupled with the effect of the contingency fee system, might lead to a substantial enhancement of an award of damages. These points have therefore ceased to have such relevance as they might otherwise have had. There remains however a matter to which their Lordships attach great H importance; and that is the question of a claim by S.N.I.A.S. over against Bristow Malaysia.

As to that, the position is as follows. First, it is plain that the American lawyers first instructed by the plaintiffs regarded Bristow

Malaysia as the plaintiffs' prime target. This is scarcely surprising in the light of the conclusions contained in the report submitted to the Brunei Department of Civil Aviation by Mr. Holden; and it is evidenced by the fact that, in the settlement of 1984, the plaintiffs did not invite S.N.I.A.S. to contribute to that settlement, or indeed to be party to it. It was not until Mr. Mithoff and Mr. Jacks were instructed, some time after that settlement, that any serious effort was made to pursue the proceedings against S.N.I.A.S.. In these circumstances, it seems to their Lordships inevitable that, if the proceedings are brought to trial, S.N.I.A.S. will wish to seek contribution from Bristow Malaysia, rather than expose themselves to the possibility of being held wholly to blame for an accident for which, if they are responsible at all, their responsibility may prove to be relatively small as compared with that of Bristow Malaysia; and the necessity for their so proceeding is underlined by the fact that the claim now made by the plaintiffs amounts to well over U.S.$20,000,000, and the amount of the settlement between the plaintiffs and the Bristow and Shell companies, which would no doubt have to be taken into account in reduction of the plaintiffs' damages, amounts to no more than U.S.$430,000. In addition, S.N.I.A.S., having been served with proceedings in Brunei by the owners and insurers of the hull of the helicopter, wish to claim contribution or indemnity from Bristow Malaysia in respect of that claim.

The Court of Appeal did not regard the expressed desire of S.N.I.A.S. to seek contribution from Bristow Malaysia as sincere. They were impressed by the number of procedural steps taken shortly before the hearing before them: these, they considered, had been "procured" by S.N.I.A.S., and were "hardly suggestive of a long-held or sincere concern." Their Lordships do not however consider that the Court of Appeal were justified in so regarding them. There was no evidence before the court that the steps taken by Bristow Malaysia were "procured" by S.N.I.A.S. True it is that the steps so taken were taken very late in the day; but having regard to the obvious desirability, in the interests of S.N.I.A.S., that it should be open to them to claim over against Bristow Malaysia in the Brunei proceedings, their Lordships do not consider that the mere lateness of those steps is productive of the inference drawn by the Court of Appeal, especially when it is borne in mind that, until December 1986, the attention of S.N.I.A.S. and their advisers was concentrated upon the Texas proceedings. Their Lordships do not doubt that the intention of S.N.I.A.S. in claiming over against Bristow Malaysia is sincere and, indeed, of great importance to them.

So their Lordships are faced with the following situation. Bristow Malaysia are contesting the jurisdiction of the Texas court; and there is nothing before their Lordships to suggest that the grounds upon which they are contesting that jurisdiction are other than substantial. On the other hand, Bristow Malaysia are prepared to accept service of third party proceedings in Brunei served upon them by S.N.I.A.S. It follows that, if the plaintiffs are permitted to proceed with the Texas proceedings, on the evidence before their Lordships it is at least possible that Bristow Malaysia will not be party to those proceedings, with the effect that S.N.I.A.S., if held liable in Texas, will have to commence separate

proceedings, presumably in Brunei, in order to seek an indemnity or contribution from Bristow Malaysia. This itself would involve multiplicity of proceedings. There are however two additional factors. First, Bristow Malaysia have already entered into a settlement with the plaintiffs, to which settlement S.N.I.A.S. are not party. If S.N.I.A.S. seek contribution or indemnity from Bristow Malaysia, Bristow Malaysia may wish to invoke that settlement as against the plaintiffs. Their Lordships do not wish to pre-empt any arguments which may be founded upon the settlement by Bristow Malaysia; but it is obviously desirable that, if Bristow Malaysia do take any such point, they should be able to do so in proceedings in which all three parties, the plaintiffs, S.N.I.A.S. and Bristow Malaysia, are involved.

The second complicating factor is of even greater importance. In seeking contribution from Bristow Malaysia, S.N.I.A.S. will have to invoke the relevant Brunei legislation which, their Lordships were informed, is in the same terms as section 6 of the English Law Reform (Married Women and Tortfeasors) Act 1935. Section 6(1)(*c*) provides:

> "(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—. . . (*c*) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . ."

Now, let it be supposed that the proceedings in Texas against S.N.I.A.S. are allowed to continue to proceed, and that in those proceedings S.N.I.A.S. are held liable to the plaintiffs. Then let it be further supposed that S.N.I.A.S. claim contribution or indemnity from Bristow Malaysia in Brunei, relying upon a judgment of the Texas court as showing that they, S.N.I.A.S., were *liable* in respect of the relevant damage. Would that judgment provide conclusive evidence that S.N.I.A.S. were so liable? Or would S.N.I.A.S. have to satisfy the Brunei court, independently of that evidence, that they were in law liable for such damage? If the latter were the case, S.N.I.A.S. would be exposed to two sets of proceedings in which the same issue of liability would have to be tried, and so would be exposed to the danger of inconsistent conclusions on that issue, with the conceivable result that they might be held liable to the plaintiffs in Texas without any right over against Bristow Malaysia in that court, and might be held not liable to the plaintiffs in Brunei, in which event they would have no claim over against Bristow Malaysia, even though negligence on the part of Bristow Malaysia may in fact have been a substantial cause of the accident.

The point has arisen in Scots law in the recent House of Lords case of *Comex Houlder Diving Ltd. v. Colne Fishing Co. Ltd.*, The Times, 20 March 1987. In Scotland, the applicable statutory provision is section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, which is not in identical terms to section 6 of the English Act of 1935. The right of contribution there arises, under section 3(2), "Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid . . .:" the words "any such action as aforesaid" refer back to the words in section 3(1):

"any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions" in which "two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses. . . ."

The House of Lords held that the words "any such action as aforesaid" in section 3(2), read in context, and in particular with reference to the words quoted from section 3(1), applied only to an action in the Scottish courts. It does not, of course, follow that a similar construction would be placed on different words in section 6 of the English Act of 1935, as applied in Brunei. But there is a danger that such a construction might be placed upon them, as is evidenced by the fact that, in *Clerk & Lindsell on Torts,* 15th ed. (1982), pp. 144–145, the view is expressed, with regard to section 1 of the Civil Liability (Contribution) Act 1978, which likewise refers to "any person *liable* in respect of any damage suffered by another person," that "a foreign judgment, it seems, gives no right to seek contribution from others liable in respect of the same damage." This is a point which it is impossible for their Lordships to resolve on an interlocutory application such as the present; but in all the circumstances their Lordships do not consider that it can be dismissed as being without substance.

So S.N.I.A.S. are now, it appears, in the unenviable position that, if the plaintiffs are not restrained from continuing their proceedings in Texas, S.N.I.A.S. may well be unable to claim over against Bristow Malaysia in those proceedings; and that, if held liable to the plaintiffs in the Texas court, they may have to bring a separate action in Brunei against Bristow Malaysia in which they may have to establish their own liability to the plaintiffs before they can be entitled to claim contribution from Bristow Malaysia, with all the attendant difficulties which this would involve, including the possibility of inconsistent conclusions on the issue of liability.

Their Lordships are of the opinion that for the plaintiffs to be permitted to proceed in a forum, Texas, other than the natural forum, Brunei, with that consequence, could indeed lead to serious injustice to S.N.I.A.S., and that the plaintiffs' conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive. Furthermore, no objection to the grant of an injunction to restrain the plaintiffs from continuing with these proceedings can be made by them on the basis of injustice to them, having regard to the undertakings given by S.N.I.A.S. It follows that, in their Lordships' opinion, an injunction should be granted.

For these reasons their Lordships are of the opinion that the appeal should be allowed, and that an injunction ought to be granted restraining the plaintiffs from further proceeding with their action against S.N.I.A.S. in the Texas court, either by themselves or by any other person on their behalf, such an injunction to be granted upon terms. As at present advised, their Lordships consider that such terms should be those contained in the following undertakings of S.N.I.A.S. set out in the appendix to this opinion, viz. 1; 2 (omitting the final parenthesis); 3; 4;

5 (omitting the final parenthesis); 6; 7; 8; 9B (substituting "20 March 1987" for "today's date" in both places where these words appear, and omitting the final parenthesis); and 12. Their Lordships wish to comment that, although the first of the letters of credit referred to in paragraph 1 of the undertakings is in a sum considerably less than that stated to be the amount of the plaintiffs' claim, nevertheless they were informed that the sum specified in the letter of credit was regarded by the plaintiffs' advisers as realistic; and further that they are prepared to allow the plaintiffs to continue the Texas proceedings until completion of pre-trial discovery simply because such discovery has already gone so far, and the trial in Brunei is likely to take place so soon, that it appears in any event to be unrealistic not to allow such discovery to be completed. If either party has any objection to the terms proposed by their Lordships, any such objection must be notified to their Lordships within 14 days, in which event their Lordships will give consideration to it; failing any such objection within such a period, the terms proposed by their Lordships will become final. So far as costs are concerned, the plaintiffs must pay the costs of S.N.I.A.S. before their Lordships and before the Court of Appeal. As regards the hearing before Mr. Commissioner Rhind, however, since it is apparent that neither party was fully prepared for that hearing, and that some misleading evidence was placed before the commissioner, their Lordships consider that each party should bear their own costs. Their Lordships will humbly advise Her Majesty accordingly.

Appendix

Undertakings by S.N.I.A.S.

1. To provide the plaintiffs within 28 days with two irrevocable letters of credit drawn in their favour and confirmed by a first class bank within Brunei in the terms annexed hereto (Annexure A).

2. Within 28 days to provide the plaintiffs' attorneys (Law Offices of Richard Warner Mithoff referred to herein as the attorneys) with the documents set out in the schedule hereto (Annexure B) in accordance with the agreement between Winstol D. Carter and Tommy Jacks referred to in paragraph [sic.] of the affidavit of Tommy Jacks. (S.N.I.A.S. say this is subject to confirmation from Carter of Fulbrights that such agreement exists with Jacks. No difficulty anticipated in this respect).

3. In addition to the documents set out in Annexure B, to produce as discovery by list within 21 days all documents relevant to the matters in question between the parties in accordance with the Brunei Rules of Court save where already disclosed. Inspection to be within 14 days thereafter. All copies requested by the plaintiffs to be supplied within 14 days of such request. Plaintiffs to pay all reasonable copying charges.

4. If and in so far as any representations are necessary to the French Ministry of Justice or any other authority to obtain permission for any act referred to herein, to make all such representations vigorously and with minimum delay and to inform the plaintiffs' attorneys upon their requests of the steps so taken.

5. That the Texas proceedings shall be permitted to continue until completion of pre-trial discovery. (S.N.I.A.S.'s position is that they are willing to undertake that they will procure A.H.C. to make any further documentary discovery of documents in the possession custody or power of A.H.C. which plaintiffs may require. S.N.I.A.S. are unwilling to accept further deposition-taking in Texas

unless the court takes the view that no injunction will be granted in the absence of such undertaking).
6. To agree to a trial date in September/October 1987 or as soon thereafter as may be convenient to the court and to cooperate in every way practicable to keep such date effective.
7. To cooperate in every practicable way in the admission to the Bar of Brunei Darussalam as ad hoc members for the purposes of this action of: William Thomas Jacks and Richard Warner Mithoff.
8. To take all such steps as may be necessary to obtain all relevant consents for the use in this action of any documents obtained by discovery in the Texas action.
9.A. *Plaintiffs' proposed clause*
To pay all reasonable costs of the firms Law Offices of Richard Warner Mithoff and Doggets, Jacks, Marston & Perlmutter, P.C (the two firms) relating to the Texas action and the Brunei action (in the latter case up to the date of judgment in this appeal). Thereafter to accept as costs in the cause all costs reasonably incurred by the two firms in connection with Brunei action, it being understood that the two firms will have the main responsibility for the preparation and carriage of that action.
B. *S.N.I.A.S.'s proposed clause*
To treat all reasonable costs of the firms Law Offices of Richard Warner Mithoff and Doggets, Jacks, Marston & Perlmutter, P.C (the two firms) relating to the substantive issues (but not the jurisdiction issues) incurred in the Texas action up to today's date as costs in cause in the Brunei action. In relation to costs incurred by the two firms after today's date, to treat all costs reasonably so incurred in connection with the Brunei action (other than any appeal by the plaintiffs from the decision of the Brunei Court of Appeal) as costs in cause in the Brunei action, it being understood that the two firms will have the main responsibility for the preparation and carriage of the Brunei action.
(Plaintiffs seek clause A. S.N.I.A.S. are prepared to agree to clause B, but if the court were to take the view that acceptance of clause A by S.N.I.A.S. were a condition precedent to the grant of the injunction they seek, they would agree to give an undertaking in the form contained in clause A).
10. There shall be liberty to apply to the High Court.
11. S.N.I.A.S. to seek leave forthwith to issue a third party notice and assuming such leave to be given, to serve a third party statement of claim on Bristow Malaysia within seven days hereof. Application for third party directions to be made immediately following service of third party statement of claim.
12. All prior agreements made by S.N.I.A.S.'s Texas lawyers regarding authentication of documents or supplying information, to be filled in blank spaces left in the oral depositions to remain in effect.
13. S.N.I.A.S. will join in any application to the Brunei courts for the initiation of any procedures available in Brunei for obtaining the foregoing oral evidence before trial in France. (S.N.I.A.S. does not agree to this but will do so if the court directs that such undertaking ought to be given by S.N.I.A.S. if an injunction is granted).

Annexure A

Letter of Credit No. 1
We Bank hereby irrevocably undertake to pay you on demand any sum together with interest thereon not exceeding U.S.$5,000,000 which may either be agreed to be due to you in respect of the liability of Société Nationale Industrielle Aerospatiale in Suit No. 187 of 1981 as a result of the crash of a Puma 330 helicopter at Kuala Belait on 16 December

1980 or which may be adjudged due to you in respect thereof from Société Nationale Industrielle Aerospatiale.

Letter of Credit No. 2

We Bank hereby irrevocably undertake to pay you on demand any sum not exceeding U.S.$500,000 which may either be agreed to be due to you in respect of costs incurred in relation to Brunei Suit No. 187 of 1981 or which may be adjudged due to you in respect of such costs from Société Nationale Industrielle Aerospatiale.

Annexure B

The documents in question are as follows:

1. The design calculations and drawings referred to in that certain letter of January 1987 from Tommy Jacks to Winstol D. Carter.
2. The documents described in the Letter of Request for International Judicial Assistance of 30 January 1987 (except that, as to certain documents pertaining to sensitive current engineering projects, S.N.I.A.S. may provide a description of each of said documents so that the plaintiffs' attorneys may better determine how essential they are to the case, and the parties will attempt to work in good faith toward the resolution of any disagreement about these documents).
3. The documents ordered to be produced by A.H.C. by the order of the Harris County, Texas, District Court dated 1987.

Solicitors: Brymer Marland & Co.; Norton Rose Botterell & Roche.

S. S.

[HOUSE OF LORDS]

McDERMID . . . . . RESPONDENT

AND

NASH DREDGING & RECLAMATION CO. LTD. APPELLANTS

1987 May 5;
July 2

Lord Bridge of Harwich, Lord Hailsham of St. Marylebone, Lord Brandon of Oakbrook, Lord Mackay of Clashfern and Lord Ackner

Negligence—Safe system of work—Ship—Deckhand instructed by employers to work on tug not owned by them—Tug's captain devising system for signalling when safe for tug to move—Captain moving tug without signal—Deckhand injured—Whether employers' duty to ensure operation of safe system—Delegation of duty to captain—Whether non-delegable duty

Shipping—Limitation of liability—Negligence—Categories of persons able to limit liability—"Any person interested in . . . the ship"—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 503(1)—Merchant Shipping (Liability of Shipowners and Others) Act 1958 (6 & 7 Eliz. 2, c. 62), s. 3(1)(2)(a)

Vicarious Liability—Master and servant—Course of employment—Deckhand instructed by employers to work on tug not owned by them—Injury to deckhand—Whether employers vicariously or personally liable for negligence of tugmaster employed by tug's owners

The plaintiff was employed by the defendants as a deckhand. In the course of his employment he worked on board a tug owned by a Dutch company and under the control of a Dutch captain employed by them. The plaintiff's work included untying ropes mooring the tug fore and aft to a dredger. The system used by the captain was that when the plaintiff had untied the ropes and it was safe for the captain to move the tug the plaintiff would give a double knock with his hand on the wheelhouse. At the time in question the plaintiff had untied the aft rope but was still in the course of untying the forward rope when the captain, without waiting for the plaintiff's signal, put the engine of the tug hard astern. As a result, the rope snaked round the plaintiff's leg, causing him serious injury. On his claim against the defendants for damages for, inter alia, negligence, Staughton J. held that his injuries had been caused by the captain's negligence, that the captain was to be deemed to have acted as the defendants' employee and that, therefore, the defendants were vicariously liable for his negligence to the plaintiff. He held, however, that the defendants were entitled to limit their liability by virtue of section 503 of the Merchant Shipping Act 1894 as extended by section 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958[1] on the ground that the captain had been their servant within the meaning of section 3(2)(*a*) of the Act of 1958. The Court of Appeal dismissed an appeal by the defendants on the question of liability and allowed a cross-appeal by the plaintiff on the limitation point.

[1] Merchant Shipping (Liability of Shipowners and Others) Act 1958, s. 3: see post, p. 915C–E.

On appeal by the defendants:—

Held, dismissing the appeal, (1) that the defendants owed the plaintiff a duty of care to devise a safe system of work for him and to see that that system was operated; that assuming that the captain's system of waiting for a double knock on the wheelhouse before putting the tug in motion could be called a safe system it had not been operated at the time of the plaintiff's accident and the captain's negligence in not operating it had not been casual or collateral but had been central to the operation of the system; that the defendants' duty of care was non-delegable in the sense that they were personally liable for its performance and could not escape their liability if it was delegated and not properly performed; and that, accordingly, although they had delegated the performance of their duty of care to the captain, they could not thereby avoid their own liability to the plaintiff (post, pp. 909E, 910F—911B, G—912B, 919A–D, F—920A, E–F).

(2) That under section 3(2)(*a*) of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 the captain had been the servant of the owners of the tug, not of the defendants; that on the true meaning of section 3(1) of the Act of 1958 "any person interested in . . . the ship" meant a person having a legal or equitable interest in the ship and, on the evidence, the whole legal and equitable interest in the tug had been in the owners; and that, accordingly, since the defendants did not fall within any of the other categories of persons in section 3 of the Act of 1958, they were not entitled to limit their liability to the plaintiff (post, pp. 909E, 912B–D, 920B–D, E–F).

Decision of the Court of Appeal [1986] Q.B. 965; [1986] 3 W.L.R. 45; [1986] 2 All E.R. 676 affirmed.

The following cases are referred to in their Lordships' opinions:

Davie v. New Merton Board Mills Ltd. [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L.(E.)

Kondis v. State Transport Authority (1984) 55 A.L.R. 225

Wilsons & Clyde Coal Co. Ltd. v. English [1938] A.C. 57; [1937] 3 All E.R. 628, H.L.(Sc.)

Wingfield v. Ellerman's Wilson Line Ltd. [1960] 2 Lloyd's Rep. 16, C.A.

The following additional case was cited in argument:

Padbury v. Holliday and Greenwood Ltd. (1912) 28 T.L.R. 494, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the defendants, Nash Dredging & Reclamation Co. Ltd., by leave of the House of Lords from the judgment of the Court of Appeal (Fox, Parker and Neill L.JJ.) [1986] Q.B. 965 given on 16 April 1986 dismissing the defendants' appeal from the judgment of Staughton J. given on 25 July 1984 and allowing a cross-appeal by the plaintiff, Jamie McDermid.

The Court of Appeal refused the defendants leave to appeal, but on 10 July 1986 the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Templeman and Lord Goff of Chieveley) [1986] 1 W.L.R. 978 allowed a petition by them for leave.

The facts are set out in the opinions of Lord Hailsham of St. Marylebone and Lord Brandon of Oakbrook.

Walter Aylen Q.C. and *David Melville* for the defendants. On the facts and in the circumstances of this case, if one puts aside the plaintiff's pleaded case, there are two possible ways of making the defendants liable: (a) by establishing that they were in breach of their duty to provide a safe system of work; or (b) by virtue of a transfer of the employment of the tugmaster, Captain Sas, from Stevin to the defendants, either by the passing of control (as in *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.* [1947] A.C. 1) or by the transfer agreement pleaded by way of amendment by the plaintiff.

Those are the only two ways in which the defendants could be liable on the facts. If they fail on (a), they accept that the fact that the system of work was designed by an independent contractor does not absolve them, so that there is no room for a third possibility, viz. that there is some general, or even qualified, liability on them for the negligence of an independent contractor. What the Court of Appeal wrongly did was to fuse this third possibility with (a).

This was a typical case of an allegation of an unsafe system. It was a precondition that the plaintiff should prove that there had been a failure of the defendants to provide it and that that failure had had a causative effect. The case should have resolved itself into a simple question of fact: was there a breach of the defendants' duty to provide a safe system or place of work? As to this, there was an act of casual negligence by Captain Sas, not a failure of the system. He did not pursue the sequence of events that the system required. As to the distinction between casual negligence and the failure of a system of work, see *Padbury v. Holliday and Greenwood Ltd.* (1912) 28 T.L.R. 494. The duty is to use reasonable care. The system, when Captain Sas followed it, was safe. The accident did not happen because of the system. The cause of the accident was the classic one of failure to keep a proper lookout. It is a simple issue of fact. [Reference was made to *Wilsons & Clyde Coal Co. Ltd. v. English* [1938] A.C. 57.]

No argument will be addressed to the House against the proposition [1986] Q.B. 965, 975E, that "in certain cases an employer would be liable in respect of the negligence of persons other than his own servants."

If and in so far as the Court of Appeal founded liability on the defendants on the basis that they had been in breach of their primary duty to provide a safe system of work for the plaintiff, they erred in the following respects. (i) There were a series of robust and wholly clear findings of fact by the trial judge as to the nature and causation of the accident. (ii) The conclusion of the Court of Appeal [1986] Q.B. 965, 980E, that "The more probable cause of this accident was the absence of a safe system, or a careless disregard by Captain Sas of the risks which his unsafe method of work entailed" does not follow from their approach to the evidence. (iii) The Court of Appeal, as an appellate court, were wrong to reject the findings of fact properly made by the trial judge. (iv) In rejecting those findings; the Court of Appeal: (a) advanced a theory, namely that Captain Sas had gone astern too quickly because he had mistaken some other sound for that of the knocks on the wheelhouse that he had prescribed as the signal that the tug was clear, that had not

been canvassed in evidence or advanced at the trial; (b) misstated, and therefore misapprehended, the primary evidence that bore on that point; (c) ignored the correct submission that, even if the establishment of the above system had been a breach of duty in itself, on the primary evidence such a breach had no causative effect on the accident.

This was a very simple case. The accident was wholly similar to a simple driving accident, or, in other words, an act of casual negligence on the part of Captain Sas for which he and/or his employers, Stevin, would undoubtedly be liable. The case is comparable to one in which A directs his employee to drive in a vehicle driven by B's employee and A's employee suffers an injury by reason of B's employee's negligent driving. Unless there were special facts that pointed to B's servant being an unsafe driver in a way that could be discovered by A, no one would suggest that A would be liable in such circumstances.

As to limitation of liability (section 3 of the Act of 1958), any reasonable analysis of the connection between Stevin and the defendants and of the agency of or delegation of powers to Captain Sas would lead to the conclusion that the defendants fell into one or more of the categories of (a) a person interested in the tug; (b) a person in possession of the tug; (c) the manager or operator of the tug. The defendants were a "person interested" and "operators" qua the plaintiff.

Alan Tyrrell Q.C. and *Roger Shawcross* for the plaintiff were not called on.

Their Lordships took time for consideration.

2 July. Lord Bridge of Harwich. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hailsham of St. Marylebone and Lord Brandon of Oakbrook. I agree with them both and for the reasons they give I would dismiss the appeal.

Lord Hailsham of St. Marylebone. My Lords, this was an action for damages for personal injuries by the plaintiff (respondent) against his employers, the defendants (appellants), as the result of an accident which took place as long ago as 22 June 1975.

The fact that on the date of the hearing of this appeal on 5 May 1987 both the question of liability and the quantum of damages were still open after nearly 12 years for discussion does not shed a very favourable light on our system for dealing with litigation of this type.

The plaintiff was employed as a deckhand by a contract in writing dated 18 June 1975 in connection with dredging work on a fjord at Lulea in Sweden. In the first sentence of this contract it was expressly agreed: "The employee shall safely comply with the lawful directions of the company's representatives. . ." It must be noted that the defendants' employers were a subsidiary (it is believed wholly-owned) of a Dutch company Stevin Baggeren B.V. ("Stevin"). The function of the defendants was to provide and pay the British staff engaged in the operation.

At the time of the accident, by direction of the defendants, the plaintiff was working on the deck of a tug (the *Ina*) owned by Stevin and under the command of her Dutch skipper (Captain Sas) who was an employee of Stevin. The tug was in fact operated turn and turn about by Captain Sas and a British skipper (Captain Clifford) who was an employee of the defendants. At all material times, however, and by direction of the defendants under clause 1 of the contract of service, the *Ina* and the plaintiff were both under the total operational control of Captain Sas and subject to his orders.

The accident may be very simply described. The plaintiff's duty, so far as material, was to tie and untie the *Ina* from a dredger to which she was made fast fore and aft by means in each case of a nylon rope attached to a bollard on the dredger by an eye and to the tug by a number of figure-of-eight loops and two half-hitches. At the time of the accident the plaintiff was under orders to untie with a view to the *Ina* going astern. He safely untied the aft rope and stowed it inboard the *Ina*. He then went forward to untie the forward rope from the dredger. His correct drill, had he completed it, would have been to slacken the rope on the *Ina's* starboard bollards in order to reduce the tension, to allow the deckhand on the dredger (whom he could clearly see) to take the eye of the rope off the dredger's port bollard, and then haul the rope in and stow it safely inboard the *Ina*, proceed to the wheelhouse and give it a double knock with his hand, in order to signal to Captain Sas that it was safe to move. In the event, after he had loosened the forward rope from the *Ina's* bollards, and before the deckhand on the dredger had had time to remove the eye of the rope from the bollard on the dredger, Captain Sas, who was at the wheel of the *Ina*, put the engine hard astern. As a result, the rope snaked round the plaintiff's leg, pulled him into the water and caused him injuries which involved the amputation of his leg and damage, recently (28 April 1986) assessed at £178,450.05 by Staughton J., to whom the case had been remitted for this purpose by the Court of Appeal.

The plaintiff's claim in the proceedings was based on the allegation, inter alia, of a "non-delegable" duty resting on his employers to take reasonable care to provide a "safe system of work": cf. *Wilsons & Clyde Coal Co. Ltd v. English* [1938] A.C. 57. The defendants did not, and could not, dispute the existence of such a duty of care, nor that it was "non-delegable" in the special sense in which the phrase is used in this connection. This special sense does not involve the proposition that the duty cannot be delegated in the sense that it is incapable of being the subject of delegation, but only that the employer cannot escape liability if the duty has been delegated and then not properly performed. Equally the defendants could not and did not attempt to dispute that it would be a central and crucial feature of any safe system on the instant facts that it would prevent so far as possible the occurrence of such an accident as actually happened, viz. injury to the plaintiff as the result of the use of the *Ina's* engine so as to move the *Ina* before both the ropes were clear of the dredger and stowed safely inboard and the plaintiff was in a position of safety.

Since such a system could easily have been designed and put in operation at the time of the accident in about half-a-dozen different ways, and since it is quite obvious that such a system would have prevented the accident had it been in operation, and since the duty to provide it was "non-delegable" in the sense that the defendants cannot escape liability by claiming to have delegated performance of their duty, it is a little difficult to see what possible defence there could ever have been to these proceedings. There was indeed a preposterous suggestion in the defendants' pleading that the plaintiff had caused or contributed to his own misfortune himself. There was never the smallest evidence of this, and, no doubt prudently, the defendants called no evidence, whether by Captain Sas or anyone else, to substantiate it. This frantic attempt to avoid or reduce liability had already died a natural death before the case left the court of trial.

Although the duty of providing a safe system of work was "non-delegable" in the special sense I have described, it had in fact been delegated on alternate shifts to Captain Sas and Captain Clifford in the circumstances I have described. In both cases the delegation covered, so far as can be ascertained, the whole operation of the *Ina*, the orders to the deckhand, the system of work to be followed and, since the skipper was at the wheel, the operation of the engine. Both Captain Sas and Captain Clifford had designed different systems of work either of which, if followed, would probably have prevented the accident in the instant appeal. The trial judge appeared to think that the system designed by Captain Sas and applicable at the time of the accident to the plaintiff was "not unsafe." But this "system" involved at its crucial stage, i.e. the point of time at which it was necessary to ascertain for certain that both the ropes were inboard and the deckhand safe, a double knock by the deckhand on the wheelhouse, which could not be delivered unless the deckhand were clear of danger. If the proper sequence was observed this would not happen until after the second rope was stowed inboard. The Court of Appeal doubted whether the "system," if it can be called such, was adequate, and I share this doubt. But it matters not. The accident happened because the *Ina* went full astern before the forward rope was clear of the dredger and with the plaintiff in a position of acute peril. There was no double knock because Captain Sas did not attempt to operate the correct sequence and did in fact operate the engines with the eye of the rope still on the bollard of the dredger. The "system" was therefore not being operated and was therefore not being "provided" at all. It matters not whether one says that there was no "system" in operation at all, or whether one says that the system provided was unsafe, or whether one says that the system in fact provided was not in use at the crucial stage. In any event the defendants had delegated their duty to the plaintiff to Captain Sas, the duty had not been performed, and the defendants must pay for the breach of their "non-delegable" obligation.

Before your Lordships it was strenuously argued that the fact that Captain Sas operated the engine in such dangerous circumstances was the "casual" or "collateral" negligence of an employee of an independent contractor, i.e. Stevin. Since Stevin was itself the holding company of

the defendants, the defendants being its wholly-owned subsidiary, I find this morally an unattractive proposition. But the fact was that the defendants had delegated their own "non-delegable" duty to Captain Sas who had charge of the whole operation and his negligence was not "collateral" or "casual" but central to the case and in total disregard of the duty owed to the plaintiff to see that the engine was not put in operation at all until it had been ascertained that it was safe to do so. Whether the system as designed by Captain Sas was adequately safe or not, whether it can truthfully be said that there was in any real sense a system at all, or whether there was a system not unsafe but not being operated, the defendants had delegated their own "non-delegable" duty and it had not been performed.

I do not wish to add anything on the second point in the appeal which related to the attempt to limit the defendants' liability under section 503 of the Merchant Shipping Act 1984 as extended by section 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958, except to say that I agree with the judgment of the Court of Appeal [1986] Q.B. 965, 980-982, and that the result is a necessary consequence of the correct analysis of the facts which I have endeavoured to give above.

In the event this appeal must be dismissed with costs. In my view it is, and always was, unarguable.

Lord Brandon of Oakbrook. My Lords, on 22 June 1975 the plaintiff, then aged 18, suffered a serious accident while working as deckhand on a tug called *Ina* in a fjord at Lulea in Sweden. In the accident his left leg was so badly injured that it had to be amputated at mid-thigh level, with grievous consequences for the whole of his future life.

On 30 November 1977 the plaintiff brought an action in the High Court in England against the defendants, by whom he was employed at the time of the accident, claiming damages for the injuries caused to him by it. The action was tried by Staughton J. on 23, 24 and 25 July 1984. He held that the defendants were liable in negligence to the plaintiff but that they were entitled to limit their liability to £43,893 under the provisions relating to limitation of liability contained in the Merchant Shipping Acts 1894 to 1984. In view of his decision that the defendants were entitled to limit their liability to this sum, the judge did not assess the full amount of the damages which the plaintiff would otherwise have been entitled to recover. He gave judgment for the plaintiff for £59,169.02 inclusive of agreed interest.

The plaintiff appealed to the Court of Appeal against the judge's decision that the defendants were entitled to limit their liability. The defendants cross-appealed against the judge's decision that they were liable at all. The appeal and cross-appeal were heard by the Court of Appeal (Fox, Parker and Neill L.JJ.) [1986] Q.B. 965 on 14 and 15 January 1986. The reserved judgment of the court prepared by Neill L.J. was handed down on 16 April 1986. In that judgment the court allowed the plaintiff's appeal and dismissed the defendants' cross-appeal. It further remitted the case to the judge for him to assess the full

A amount of the damages which the plaintiff was entitled to recover. On 28 April 1986 Staughton J. assessed those damages at £178,450.05 inclusive of agreed interest.

My Lords, the primary facts relevant to this appeal are not in dispute. The appellants are a wholly owned subsidiary of a Dutch dredging company, Stevin Baggeren B.V. In June 1975 the appellants and Stevin were together engaged in dredging operations for the Swedish B government in the fjord at Lulea. The dredger was moored off-shore and a tug called *Ina*, owned by Stevin, was used in the operations. These continued round the clock so that the complement of the tug worked shifts. There were two masters of the tug, each of whom worked a 12-hour shift. One of these was Captain Clifford, who was employed by the defendants. The other was Captain Sas, who was employed by C Stevin.

The part played by the plaintiff in the operations and the circumstances of his accident are concisely set out in the judgment of Staughton J. (transcript, pp. 35–36):

> "The task in hand there was dredging a fjord. At first the plaintiff worked on the dredger for a few days; then he was transferred to being a deckhand on the tug *Ina*. The complement of the tug was a D master, Captain Sas, the plaintiff as deckhand, and a greaser to look after the engines. It was used in the main to push barges from alongside the dredger to a dumping ground, but also to transport those working on the operation from and to the shore at the beginning and end of shifts. The task of the plaintiff as deckhand was to keep the deck clean and tidy, and to see to the tying up and E untying of the tug, whether alongside the dredger or elsewhere. This involved two man-made fibre ropes, each 1½ inches in diameter, with an eye at one end. The eye of one rope would be placed over a bollard on the dredger, and then the rope would be secured to two bollards on the tug by two figure-of-eight turns and two half-hitches. The remainder of the rope would then be coiled on the F deck of the tug inboard of the two bollards. The same process would be carried out for each rope, except that one was secured to the for'ard end of the tug and one to the aft end. To untie the ropes the plaintiff would first slacken the aft rope by removing it from the two bollards on the tug, next it would be removed from the bollard on the dredger, and the plaintiff would haul it aboard the tug. He would then do the same with the for'ard rope. Finally, G he would give two knocks on the side of the wheelhouse to indicate to Captain Sas that the ropes were both on board. On 22 July 1975, when the plaintiff had been working on the tug for two days, the tug was tied up to the dredger, and the time came when she was to leave. Captain Sas, who did not speak much English, signed to the plaintiff to untie the ropes. The plaintiff took the aft rope off first as the tug was leaving with engine astern. He then moved to the H for'ard rope and started removing it from the two bollards on board the tug. As he was doing so, Captain Sas put the engine astern prematurely; he started to move the tug away from the dredger. The plaintiff immediately stood back as he thought that the rope

might break and injure him, but instead it was pulled through the bollard and he went with it. He has some recollection of the rope being round his left leg and of being pulled through the bollard. After that he was in the water, with his left leg very seriously injured."

The plaintiff sought to establish liability against the defendants on various grounds. Of these it is only necessary to consider two: the first that the accident was caused by the negligence of Captain Sas for which the defendants were vicariously liable; and the second that the accident was caused by the negligence of the defendants in failing to provide a safe system of work for the plaintiff.

With regard to the first ground of liability, the defendants did not admit that the accident had been caused by any negligence of Captain Sas. They further contended that, even if it had been so caused, Captain Sas was the servant of Stevin and not of the defendants, so that the defendants were not vicariously liable for the consequences of his negligence.

The defendants did not call Captain Sas to give evidence. In these circumstances Staughton J. rightly had no hesitation in finding, first, that Captain Sas had been negligent in putting the tug's engines astern prematurely, and, secondly, that the accident had been caused by his negligence in this respect. With regard to that negligence he said (transcript, p. 38):

> "That may have taken the form of carelessness in not waiting for the plaintiff's signal before putting the engine astern, or else a deliberate, but dangerous, manoeuvre designed to encourage the plaintiff to perform his tasks more quickly."

On the question of the defendants' vicarious liability for the negligence of Captain Sas Staughton J. said (transcript, pp. 42–43):

> "On the evidence, it seems to me that the defendants, through some person at Lulea, in effect instructed the plaintiff to work with and under Captain Sas pursuant to the plaintiff's contract of employment with the defendants. They made Captain Sas the foreman, boss or chargehand through whom their orders would reach the plaintiff, and to whom the plaintiff would render directly the service which he owed to the defendants. As between the plaintiff and the defendants, Captain Sas must be taken to have been the servant of the defendants. If that involves any novel doctrine, so be it. The common law would become obsolete if it did not develop to meet new situations."

With regard to the second ground of liability relied on by the plaintiff, Staughton J. found that the system of work provided for the plaintiff was not unsafe. In this connection he said (transcript, pp. 38–39):

> "The task of the plaintiff was a simple one and well within his capabilities. Given due care and attention on the part of himself and Captain Sas, there was nothing unsafe about it."

In the result Staughton J. decided that the plaintiff succeeded against the defendants on the first ground of liability referred to above, namely, vicarious liability for the negligence of Captain Sas, but failed on the second ground of liability, namely, failure of the defendants to provide a safe system of work for the plaintiff.

The defendants contended that, if they were liable to the plaintiff, they were entitled to limit the amount of their liability to £43,893 under the provisions relating to limitation of liability contained in the Merchant Shipping Acts. For the plaintiff it was not disputed that, if the defendants were entitled to limit their liability under these provisions, the amount of their limited liability was £43,893. It was disputed, however, that the defendants were entitled to limit their liability at all.

The right to limit liability for certain occurrences, including accidents causing personal injury to some person, was given to shipowners only by section 503 (in Part VIII) of the Merchant Shipping Act 1894. That right was extended to persons other than shipowners by section 3 of the Merchant Shipping (Liability of Shipowners and Others) Act 1958 which provides:

> "(1) The persons whose liability in connection with a ship is excluded or limited by Part VIII of the Merchant Shipping Act 1894 shall include any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship. (2) In relation to a claim arising from the act or omission of any person in his capacity as master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owners or of any such person as is mentioned in subsection (1) of this section,—(*a*) the persons whose liability is excluded or limited as aforesaid shall also include the master, member of the crew or servant, and, in a case where the master or member of the crew is the servant of a person whose liability would not be excluded or limited apart from this paragraph, the person whose servant he is; . . ."

Staughton J., having decided that, as between the plaintiff and the defendants, Captain Sas was to be taken to have been the servant of the defendants, went on to hold that the defendants were entitled to limit their liability, subject to any question of actual fault or privity, under subsection 2(*a*) above, on the ground that the plaintiff's claim arose from the act or omission of Captain Sas in his capacity as master of the tug *Ina* and that Captain Sas was at the time of such act or omission the servant of the defendants. Staughton J. went on to find that there had been no actual fault or privity of the defendants (a finding which was affirmed by the Court of Appeal and not challenged in your Lordships' House), and held that the defendants were therefore entitled to limit their liability as contended for by them.

Neill L.J., giving the judgment of the Court of Appeal [1986] Q.B. 965, did not accept the judge's view that the defendants were liable to the plaintiff because Captain Sas was to be taken, as between the plaintiff and the defendants, to have been the servant of the defendants. He concluded, after an examination of all the relevant evidence, that

Captain Sas was, and remained at all material times, the servant of Stevin. He went on to say, however, that this circumstance did not conclude the issue of liability in favour of the defendants, because it was also necessary to consider the question whether the defendants were in breach of the personal duty of care owed by them to the plaintiff. In this connection he said, at p. 974:

> "In the instant case the relevant facet of the general duty of the defendants to take reasonable care for the safety of the young plaintiff was the obligation to provide and maintain in operation a safe system of work."

Neill L.J. then examined the evidence relating to the system of work, and in particular that of Captain Clifford, the other tugmaster, who alternated with Captain Sas in the command of the tug. Captain Clifford's evidence was that he did not rely on knocks by his deckhand on the outside of the wheelhouse in order to be assured that the deckhand had completed his work. He relied instead on one of three indications: a shout by the deckhand of "all gone," a hand signal by the deckhand to that effect, or himself coming out of the wheelhouse and looking at the bollards on the tug. Having examined the evidence Neill L.J. said, at pp. 974–975:

> "In these circumstances there was scope for a finding that the system used by Captain Sas was not a safe system, because it relied largely (if not exclusively) on a sound signal of a kind which was not distinctive like the shout 'all gone,' and which might be confused with one of the many other noises likely to be heard during dredging operations at sea. But the very experienced judge, who heard the evidence, came to the conclusion that the system of work was not unsafe. Furthermore, the judge concluded that the accident happened, not because of a fault in the system, but because Captain Sas either carelessly did not wait for the signal, or because he deliberately put the tug astern to make the plaintiff move more quickly. We have come to the conclusion, however, that in the circumstances of this case it is unrealistic to attempt to draw a clear dividing line between the system of work which Captain Sas laid down for the plaintiff to follow, and the actual conduct of Captain Sas which caused the accident and the plaintiff's injuries. Captain Sas did not give evidence and the precise sequence of events can only be a matter of conjecture. We consider that it is just as likely that Captain Sas mistook some other sound for a signal from the plaintiff as that he carelessly failed to wait for the plaintiff's signal or that he put the engines astern deliberately in order to make the plaintiff hurry up."

Neill L.J. then discussed at length the principles of law governing the question of when employers may be held liable for the acts or omissions of a person who is not their servant. In the course of that discussion he referred to and cited from two well known English authorities, *Davie v. New Merton Board Mills Ltd.* [1959] A.C. 604 and *Wingfield v. Ellerman's Wilson Line Ltd.* [1960] 2 Lloyd's Rep. 16, and a recent

decision of the High Court of Australia, *Kondis v. State Transport Authority* (1984) 55 A.L.R. 225.

He expressed his conclusions with regard to the proper principles of law to be applied and the proper approach to be followed, at pp. 979-980:

> "Neither in the cases to which we were referred in the course of the argument, however, nor in the other authorities to which we have had regard in the course of considering this judgment, have we been able to discover any general principle which provides a sure guide to the limits of vicarious liability in tort. It is clear that the legacy of the doctrine of common employment remains, together with the rather uneasy division between cases where an employer may be liable for the negligent performance of his personal duties by a third party and cases where the employer may be liable vicariously for the negligence of an employee or agent. It seems to this court, therefore, that in a case where a plaintiff is suing in respect of injuries received by him in the course of his employment and while working at a place at which he is required by his employer to work, the only satisfactory approach is to look at all the circumstances in the light of the fact that it is the basic duty of the employer to take reasonable care so to conduct his operations as not to subject those employed by him to unnecessary risk. The relevant circumstances will include: (a) the skill and experience of the injured employee, (b) the nature of the task on which the employee was employed, (c) the place where the injured employee was employed and the degree of control which the employer exercised at that place, (d) the relationship, if any, between the injured employee and the individual tortfeasor, (e) the relationship, if any, between the employer and the individual tortfeasor, (f) the interest, if any, of the employer in the actual task which the individual tortfeasor was performing when the accident occurred."

Neill L.J. went on to apply this statement of the proper principles of law to be applied and the proper approach to be followed to the facts of the present case, at p. 980:

> "It is true that the tug *Ina* was owned by Stevin and that Captain Sas was employed by Stevin. But Captain Sas and the plaintiff were working together in a small team of three to perform a contract which, as we understand the matter, the defendants and Stevin were carrying out together. Indeed, as we have already observed, on alternate shifts the captain of the tug was Captain Clifford, an employee of the defendants. The defendants put the plaintiff (who was a young and inexperienced deckhand) under the control and into the care of Captain Sas. He was their agent or delegate to take reasonable care to devise a safe system of work on board the tug. In the circumstances of this case, he was also the agent or delegate to take reasonable care to see that the safe system was carried out. The defendants themselves, of course, were a limited company with headquarters in Guildford. They could only operate through their employees or other agents. It seems to us that on any sensible view

of the doctrine of vicarious liability Captain Sas was the agent or delegate of the defendants to perform their duty towards the plaintiff. If there had been clear evidence that Captain Sas had put the tug astern when he *knew* that the plaintiff had not released the rope, we would have felt great difficulty in regarding the defendants as being vicariously responsible for such an action. The more probable cause of this accident was the absence of a safe system, or a careless disregard by Captain Sas of the risks which his unsafe method of work entailed. With all due respect to the judge, we would decide the issue of liability in favour of the plaintiff, not because we think that Captain Sas 'must be taken to have been the servant of' the defendants, but because he was the person entrusted by the defendants with performing their duty to take reasonable care for the safety of this young man."

Neill L.J. then turned to the issue of limitation of liability. After setting out the relevant parts of section 503 of the Act of 1894 and section 3 of the Act of 1958, he said that the defendants would only be entitled to limit their liability if they could show that they fell into one or more of the following categories: (1) the owners of the tug, (2) the charterers of the tug, (3) a person interested in the tug, (4) a person in possession of the tug, (5) the manager or operator of the tug, (6) the masters of Captain Sas. The judge, he said, had held that the defendants were entitled to limit their liability on the ground that they fell into category (6), namely, masters of Captain Sas. On the Court of Appeal's view of the matter, however, Stevin were the masters of Captain Sas and the defendants were not. The defendants did not fall into any of the other categories either. Accordingly they were not entitled to limit their liability.

My Lords, I consider first the primary issue as to whether the defendants are liable to the plaintiff at all, either on the ground relied on by Staughton J. or on the different ground relied on by the Court of Appeal. In relation to this issue I would make a number of observations. First, there was, in my opinion, no material on which Staughton J. was entitled to find that a possible explanation of the action of Captain Sas in putting the engines astern prematurely was that he did so deliberately in order to encourage the plaintiff to perform his tasks more quickly. There was no evidence that Captain Sas thought that the plaintiff worked too slowly, and, in the absence of such evidence, the suggestion that Captain Sas deliberately put the plaintiff in danger in order to teach him a lesson is not one which ought to be entertained. Secondly, I agree with the Court of Appeal that Captain Sas was, and remained at all material times, the servant of Stevin, and that Staughton J. was wrong in holding that, as between the plaintiff and the defendants, Captain Sas must be taken to have been the servant of the defendants. Thirdly, I agree with the Court of Appeal that the real question in the case is whether the defendants were in breach of the duty of care which they owed to the plaintiff in not devising and operating a safe system of work for him. Fourthly, I agree with the Court of Appeal that there was scope on the evidence for a finding that the system of work devised by

Captain Sas, under which the plaintiff was to inform him that he had completed his work of unmooring by knocking on the outside of the wheelhouse was unsafe. However, for reasons which will become apparent, I do not consider that it is necessary to reach a conclusion on that point.

My Lords, the Court of Appeal regarded the case as raising difficult questions of law on which clear authority was not easy to find. With great respect to the elaborate judgment of that court, I think that they have treated the case as more difficult than it really is. A statement of the relevant principle of law can be divided into three parts. First, an employer owes to his employee a duty to exercise reasonable care to ensure that the system of work provided for him is a safe one. Secondly, the provision of a safe system of work has two aspects: (a) the devising of such a system and (b) the operation of it. Thirdly, the duty concerned has been described alternatively as either personal or non-delegable. The meaning of these expressions is not self-evident and needs explaining. The essential characteristic of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty.

In the present case the relevant system of work in relation to the plaintiff was the system for unmooring the tug *Ina*. In the events which occurred the defendants delegated both the devising and the operating of such system to Captain Sas, who was not their servant. An essential feature of such system, if it was to be a safe one, was that Captain Sas would not work the tug's engines ahead or astern until he knew that the plaintiff had completed his work of unmooring the tug. The system which Captain Sas devised was one under which the plaintiff would let him know that he had completed that work by giving two knocks on the outside of the wheelhouse. I have already said that I agree with the Court of Appeal that there was scope, on the evidence, for a finding that that system was not a safe one. I shall assume, however, in the absence of any contrary finding by Staughton J., that that system, as devised by Captain Sas, was safe. The crucial point, however, is that, on the occasion of the plaintiff's accident, Captain Sas did not operate that system. He negligently failed to operate it in that he put the tug's engines astern at a time when the plaintiff had not given, and he, Captain Sas, could not therefore have heard, the prescribed signal of two knocks by the plaintiff on the outside of the wheelhouse. For this failure by Captain Sas to operate the system which he had devised, the defendants, as the plaintiff's employers, are personally, not vicariously, liable to him.

It was contended for the defendants that the negligence of Captain Sas was not negligence in failing to operate the safe system which he had devised. It was rather casual negligence in the course of operating such system, for which the defendants, since Captain Sas was not their servant, were not liable. I cannot accept that contention. The negligence of Captain Sas was not casual but central. It involved abandoning the safe system of work which he had devised and operating in its place a

manifestly unsafe system. In the result there was a failure by the defendants, not in devising a safe system of work for the plaintiff, but in operating one.

On these grounds, which while not differing in substance from those relied on by the Court of Appeal are perhaps more simply and directly expressed, I agree with that court that the defendants are liable to the plaintiff.

I turn to the secondary issue of limitation of liability. With regard to this, I agree entirely with the analysis of the relevant statutory provisions made by the Court of Appeal. In order to succeed on limitation, the defendants had to bring themselves within the six categories of persons specified by Neill L.J., to which I referred earlier. On the footing that Captain Sas was not to be taken to have been the defendants' servant, they could not bring themselves within category (6). Nor, in my opinion, could they bring themselves within any of the other categories, (1) to (5). Before your Lordships counsel for the defendants submitted that they came within category (3) as persons interested in the tug. In my opinion the expression "any person interested in . . . the ship," as used in section 3(1) of the Act of 1958, means a person having a legal or equitable interest in the ship. In the present case the whole legal and equitable interest in the tug *Ina* was, on the evidence, in Stevin. I do not therefore think that there is any substance in this submission.

My Lords, for the reasons which I have given, I consider that the Court of Appeal decided rightly both the issues which arise on this appeal, and I would accordingly dismiss the appeal with costs.

Lord Mackay of Clashfern. My Lords, for the reasons given in the speeches of my noble and learned friends Lord Hailsham of St. Marylebone and Lord Brandon of Oakbrook, with which I agree, I would dismiss the appeal.

Lord Ackner. My Lords, for the reasons given in the speeches of my noble and learned friends Lord Hailsham of St. Marylebone and Lord Brandon of Oakbrook, with which I agree, I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Mackrell & Co.; Penningtons Ward Bowie for Woodford & Ackroyd, Southampton.

M. G.

SUBJECT MATTER

CHILDREN AND YOUNG PERSONS

Care proceedings

Relevant considerations

Child born with drug dependency due to mother's drug abuse—Child taken from mother at birth—Juvenile court finding that child's health being impaired or proper development being prevented—Whether mother's conduct during pregnancy relevant—Whether justices entitled to make care order—Children and Young Persons Act 1969, s. 1(2)(*a*)

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COMPANY

Capital

Reduction

Confirmation of—Proposed reduction of capital by cancellation of preferred shares—Reduction proposals passed by special resolution at extraordinary general meeting—No separate meeting of preferred shareholders—Whether abrogation of preferred shareholders' rights

House of Fraser Plc. v. A.C.G.E. Investments Ltd., H.L.(Sc.) **387**

CRIME

Attempt

Drugs importation, prohibition on

Belief in substance dealt with and harboured being heroin—Substance in fact not drug—Whether attempting to be knowingly concerned in dealing with or harbouring drug—Customs and Excise Management Act 1979, s. 170(1)(*b*)—Criminal Attempts Act 1981, s. 1

Reg. v. Shivpuri, H.L.(E.) **1**

Drugs

Unauthorised possession

Exceptions from prohibition against possession—Preparation containing small proportion of controlled drug—Burden of proof—Misuse of Drugs Act 1971, s. 5(1)(2)—Misuse of Drugs Regulations 1973, reg. 4(1), Sch. 1, para. 3 (as amended by Misuse of Drugs (Amendment) Regulations 1983, reg. 2)

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"Supply"

Person in physical control of drug—Intention to return to owner by transfer of physical control—Whether defence to charge of intent to supply—Misuse of Drugs Act 1971, ss. 4(1)(*b*), 5(3)

Reg. v. Maginnis, H.L.(E.) **303**

Evidence

Corroboration

Accomplice—Warning to jury of danger of convicting on uncorroborated testimony of accomplices—Jury directed to reject accomplice evidence if not credible—Jury not directed to decide whether accomplice evidence credible before considering corroborative evidence—Whether misdirection

Attorney-General of Hong Kong v. Wong Muk Ping, P.C. **501**

Patients detained in secure hospital—Complaints against nurses of ill-treatment—Warning of danger of convicting on patients' uncorroborated evidence essential

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Hearsay

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